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NOV 8 '60

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36634

LEON DAVIDSON,  
Plaintiff in Error,

v.

SEARS COMMUNITY STATE BANK,  
a corporation,  
Defendant in Error.

ERROR TO MUNICIPAL  
COURT OF CHICAGO.

274 I.A. 649<sup>1</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

In an action in the Municipal court upon contract, and upon trial by the court, there was a finding for defendant with judgment thereon, which plaintiff by this writ of error seeks to reverse.

The statement of claim averred that on July 5, 1927, the Community State Bank, predecessor of defendant bank, (both corporations having been organized under the banking laws of the State of Illinois) sold to plaintiff real estate bonds of the par value of \$8,000, with coupons attached, for which plaintiff paid to the bank \$8,217; that as a part of the transaction the bank agreed it would repurchase the bonds at the same price at any time thereafter; that on May 28, 1932, plaintiff tendered the bonds and demanded that defendant repurchase the same according to its promise, but that defendant failed and refused to do so. By a later amendment plaintiff added a paragraph demanding \$9,000 for money had and received on or about May 28, 1932. As to this last paragraph, defendant pleaded the five-year statute of limitations.

The affidavit of merits denied the execution of the

NOV 8 1960

2/10/60

ORDER TO DISMISS

COURT OF CHICAGO

274 I.A. 649

MR. PRESIDING JUDGE HAZEN  
DELIVERED THE OPINION OF THE COURT.

In an action in the Municipal Court upon contract, and upon trial by the court, there was a finding for defendant with judgment thereon, which plaintiff by this writ of error seeks to reverse.

The statement of claim averred that on July 5, 1957, the Community State Bank, predecessor of defendant bank, (both corporations having been organized under the banking laws of the State of Illinois) sold to plaintiff real estate bonds of the par value of \$8,000, with coupons attached, for which plaintiff paid to the bank \$8,317; that as a part of the transaction the bank agreed it would repurchase the bonds at the same price at any time thereafter; that on May 28, 1958, plaintiff tendered the bonds and demanded that defendant repurchase the same according to the promise, but that defendant failed and refused to do so. By a later amendment plaintiff added a paragraph demanding \$9,000 for money had and received on or about May 28, 1958. In this last paragraph, defendant pleaded the following statute of limitations.

The statute of limitations denied the execution of the

LORE HAVILSON,  
Plaintiff in error,  
v.  
BEARS COMMUNITY STATE BANK,  
a corporation,  
Defendant in error.

25534



contract. The affidavit also asserted that as a banking corporation the execution of this contract was ultra vires the corporation; that the contract was contrary to the by-laws of the bank; that the successor bank had no knowledge of the contract when it took over the assets of its predecessor; that defendant by collecting interest on the bonds had elected unconditionally to reaffirm the contract of purchase; that the offer to repurchase was not accepted by plaintiff within a reasonable time; that the contract was illegal and void as violating section 33 of chapter 38 of the act entitled, "An Act for the protection of bank depositors;" that the demand to repurchase was not made within a reasonable time; that any agreement of any employee or agent of the bank to repurchase said bonds was without authority from defendant or the board of directors of defendant; that defendant had no knowledge of the agreement and has at all times disclaimed the authorities of such person, employee or agent to enter into any such agreement, and that the predecessor of defendant made no such agreement; that the agent or servant of the predecessor bank had no authority to make the same, and that if it was made it was unknown to the board of directors of the predecessor bank.

As already stated, the issues were submitted to the court and the evidence taken. Propositions of law were submitted by plaintiff, and some were held as requested and others refused. As already stated, the finding was for defendant with judgment thereon.

The controlling question in the case is whether the agreement to repurchase these bonds on demand was valid and enforceable. Plaintiff contends that it was in the nature of a conditional sales contract and was neither ultra vires the corporation and contrary to public policy nor prohibited by any statute of this state and on this point relies on Freedman v. Madison & Kedzie State Bank, 259 Ill. App. 519; Avotin v. Atlas Exchange Nat'l Bank, 265 Ill. App.

contract. The affidavit also asserted that as a banking corporation the execution of this contract was ultra vires the corporation; that the contract was contrary to the by-laws of the bank; that the receiver bank had no knowledge of the contract when it took over the assets of the predecessor; that defendant by collecting interest on the bonds had effected unconditionally to vest in the contract of purchase; that the offer to repurchase was not accepted by plaintiff within a reasonable time; that the contract was illegal and void as violating section 38 of chapter 33 of the act entitled, "An Act for the protection of bank depositors"; that the demand to repurchase was not made within a reasonable time; that any agreement of any employee or agent of the bank to repurchase said bonds was without authority from defendant or the board of directors of defendant; that defendant had no knowledge of the agreement and was at all times disinterested the authorities of such persons, employee or agent to enter into any such agreement, and that the predecessor of defendant made no such agreement; that the agent or servant of the predecessor bank had no authority to make the same, and that it was made it was unknown to the board of directors of the predecessor bank. As already stated, the issues were submitted to the court and the evidence taken. Propositions of law were submitted by plaintiff, and were held on requested and others returned. As already stated, the finding was for defendant with judgment thereon. The controlling question in the case is whether the agreement to repurchase these bonds on demand was valid and enforceable. Plaintiff contends that it was in the nature of a conditional sales contract and was neither ultra vires the corporation and contrary to public policy nor prohibited by any statute of this state and on this point relies on Wadsworth v. Wadsworth & Leland State Bank, 203 Ill. App. 512; Wells v. Allen Exchange Nat'l Bank, 203 Ill. App.



238; Knass v. Madison & Kedzie State Bank, 259 Ill. App. 533;  
Hoffman v. Sears Community State Bank, 369 Ill. App. 644; Wolf  
v. Nat'l Bank of Ill., 178 Ill. 86. The authorities cited support  
the proposition of law for which plaintiff contends, but in the  
Knass case cited (a certificate of importance having been granted  
by this court to the Supreme court) the decree was reversed by that  
court (Knass v. Madison & Kedzie State Bank, 351 Ill. 554) the  
court holding a contract of this kind void and unenforceable. It  
is the duty of this court to follow the law as declared by the  
supreme court of the state, and in conformity with that opinion,  
the judgment of the trial court is affirmed.

AFFIRMED.

McSurely and O'Connor, JJ., concur.



37026

CLARA OTTO,  
Appellee.

vs.

GUY A. RICHARDSON, as Receiver,  
etc., et al.,  
Appellants.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

274 I.A. 649<sup>2</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

I. In an action upon the case for personal injuries and upon trial by jury there was a verdict for plaintiff in the sum of \$15,000. Plaintiff remitted \$5,000, and the court overruling motions for a new trial and in arrest entered judgment for plaintiff in the sum of \$10,000, which defendants contend should be reversed.

It is argued that the verdict is against the manifest weight of the evidence; that the court erred in the giving and refusing of instructions and in its rulings upon the admission of evidence, and that the damages are excessive.

The declaration was in two counts. The first in substance alleged that on December 16, 1931, plaintiff was a passenger for hire on one of defendants' street cars; that it thereupon became the duty of defendants to exercise the highest degree of care, etc., so as not to cause injury or harm to her; that they did not observe their duty, but on the contrary "by their then agents and servants" so carelessly, negligently and improperly managed, operated and controlled the car that plaintiff was thrown from her position thereon to the street and injured.

The second count, adopting paragraphs of the first, avers that it became the duty of defendants to keep and maintain the street car at a standstill until plaintiff had completely boarded the same; that they did not observe their duty but on the contrary caused the car to be moved forward with a sudden and violent jerk, in consequence of which plaintiff was thrown from her



ST 4 I.A. 043

STATEMENT OF THE DEFENDANT

1. In an action upon the case for personal injuries and damages, the defendant, JAMES H. HARRIS, who is now residing at 1000 North 10th Street, St. Paul, Minnesota, has filed the following statement in answer to the interrogatories of the plaintiff, JAMES H. HARRIS, who is now residing at 1000 North 10th Street, St. Paul, Minnesota.

2. The defendant, JAMES H. HARRIS, who is now residing at 1000 North 10th Street, St. Paul, Minnesota, has filed the following statement in answer to the interrogatories of the plaintiff, JAMES H. HARRIS, who is now residing at 1000 North 10th Street, St. Paul, Minnesota.

3. The defendant, JAMES H. HARRIS, who is now residing at 1000 North 10th Street, St. Paul, Minnesota, has filed the following statement in answer to the interrogatories of the plaintiff, JAMES H. HARRIS, who is now residing at 1000 North 10th Street, St. Paul, Minnesota.

4. The defendant, JAMES H. HARRIS, who is now residing at 1000 North 10th Street, St. Paul, Minnesota, has filed the following statement in answer to the interrogatories of the plaintiff, JAMES H. HARRIS, who is now residing at 1000 North 10th Street, St. Paul, Minnesota.

5. The defendant, JAMES H. HARRIS, who is now residing at 1000 North 10th Street, St. Paul, Minnesota, has filed the following statement in answer to the interrogatories of the plaintiff, JAMES H. HARRIS, who is now residing at 1000 North 10th Street, St. Paul, Minnesota.

6. The defendant, JAMES H. HARRIS, who is now residing at 1000 North 10th Street, St. Paul, Minnesota, has filed the following statement in answer to the interrogatories of the plaintiff, JAMES H. HARRIS, who is now residing at 1000 North 10th Street, St. Paul, Minnesota.

7. The defendant, JAMES H. HARRIS, who is now residing at 1000 North 10th Street, St. Paul, Minnesota, has filed the following statement in answer to the interrogatories of the plaintiff, JAMES H. HARRIS, who is now residing at 1000 North 10th Street, St. Paul, Minnesota.

8. The defendant, JAMES H. HARRIS, who is now residing at 1000 North 10th Street, St. Paul, Minnesota, has filed the following statement in answer to the interrogatories of the plaintiff, JAMES H. HARRIS, who is now residing at 1000 North 10th Street, St. Paul, Minnesota.

9. The defendant, JAMES H. HARRIS, who is now residing at 1000 North 10th Street, St. Paul, Minnesota, has filed the following statement in answer to the interrogatories of the plaintiff, JAMES H. HARRIS, who is now residing at 1000 North 10th Street, St. Paul, Minnesota.

10. The defendant, JAMES H. HARRIS, who is now residing at 1000 North 10th Street, St. Paul, Minnesota, has filed the following statement in answer to the interrogatories of the plaintiff, JAMES H. HARRIS, who is now residing at 1000 North 10th Street, St. Paul, Minnesota.

position and injured.

11. We will first consider the contention that the verdict is against the manifest weight of the evidence. While some of the facts are conceded, there is a sharp conflict as to most material matters. It is conceded that plaintiff was injured at the time alleged (how severely is a matter in dispute) at or near the intersection of Normal boulevard and 59th street in Chicago. Normal boulevard is a public street extending north and south; 59th street a public street extending east and west; there are no street car tracks in Normal boulevard; there are two street car tracks in 59th street; westbound cars run over the north track; eastbound cars over the south track. Plaintiff, a widow, lived at 3604 Wallace street; a sister lived at 57th street and Farnell avenue about two blocks from 59th street and Normal boulevard. On the afternoon of the day in question plaintiff went to the home of her sister, taking with her a little daughter, Lorraine, then six years of age. Plaintiff left her sister's home just before dark, she says, and walked south intending to take a 59th street westbound car at Normal boulevard to Racine avenue and thence home.

Plaintiff says she stood for awhile on the northeast corner of the intersection; that a street car came from the east going west, and stopped; that she then took the little girl by the hand and walked toward the street car to the back part of it, picked up the little girl, set her on the rear of the platform, and while holding the arm of the child plaintiff tried to get on; she says, "I was getting on with my feet, trying to get up, and the car jerked and went and I fell off and that is all I know." She woke up, she says, in St. Bernard's hospital.

On the contrary Mr. Walsh, the motorman on the street car in question, testifies that the street car he was operating was a pay-as-you-enter car with vestibules at each end; that the conductor

position and interest.

11. We will first consider the connection with the various in regard to the content of the evidence. While some of the facts are correct, there is a sharp conflict as to most material matters. It is conceded that plaintiff was injured at the time alleged (now severely is a matter in dispute) at or near the intersection of Belmont Boulevard and 30th Street in Chicago. Belmont Boulevard is a public street extending north and south; 30th Street is a public street extending east and west; there are no street cars in Belmont Boulevard; there are two street cars tracks in 30th Street; plaintiff was with the horse team; defendant was over the curb track. Plaintiff, a widow, lived at 3004 Williams Street; a sister lived at 47th Street and Belmont Avenue about two blocks from 30th Street and Belmont Boulevard. On the afternoon of the day in question plaintiff went to the home of her sister, taking with her a little daughter, Lawrence, then six years of age. Plaintiff left her sister's home just before dark, she says, and walked south intending to take a 30th Street car and get to Belmont Boulevard to Belmont Avenue and Thomas home.

Plaintiff says she stood for awhile on the southeast corner of the intersection; that a street car came from the east going west and stopped; that she then took the little girl by the hand and walked toward the street car to the back part of it, placed up the little girl, and sat on the top of the platform, and while holding the arm of the child plaintiff tried to get up; she says, "I was getting up with my foot, trying to get up, and the car started and went and I fell off and that is all I know." She went up, she says, in 30.

Defendant's testimony.

On the contrary Mr. Walsh, the witness on the street car in question, testified that the street car was westward and a



was at the back end of the car; that he himself was in front; that passengers get on at the rear but could get off at either end; that as his car slowed down for Normal Boulevard he noticed plaintiff, the little girl and a man standing alongside the car track about three feet "in the clear;" that when the street car was about five or six feet from plaintiff she fell down on the track in front of the street car; that he put on the emergency brake and stopped the car almost instantly; that it ran over her and the fender pushed her off the track; that when he got off the car she was under the front step where people get off, which is on the right hand side of the car; that he picked her up and put her in a sitting position when two police officers came along in a car; that the child ran away and the man who was waiting for a street car with plaintiff went to look for her when plaintiff was put in the squad car. He says he noticed when plaintiff was lifted up that one of her slippers came off; that a man on the street picked it up and handed it to him; that the slipper was picked up near the front step; that the police squad came within three minutes after the accident; that when he first saw plaintiff he was about 35 feet east of the Normal Boulevard crosswalk. The street car was about 40 feet long; it was at this time lighted up. He says that when plaintiff was picked up she seemed to be unconscious, and he also says that he examined the ground where she fell; that there was a hollow with ice in it and the ice was scratched.

Rose Fricka, a House to House canvasser, who at this time lived at 5907 Normal Boulevard, testified for plaintiff <sup>that</sup> at the time of the accident she was walking north on the east side of Normal Boulevard on her way to a drugstore on the northwest corner of the intersection; that she saw the street car coming and saw plaintiff with her little girl; that plaintiff was on the corner waiting for the car; that when <sup>the</sup> street car stopped she (witness) crossed the street



was at the back end of the car; that he himself was in front; that passengers at one of the rear but could get off at either end; that as the car started down the boulevard he noticed immediately the little girl and a man standing alongside the car track about three feet "in the street"; that when the street car was about five or six feet from himself he fell down on the track in front of the street car; that he put on the emergency brake and stopped the car almost instantly; that it ran over her and the teacher pushed her off the track; that when he got off the car she was under the front step where people get off, which is on the right hand side of the car; that he picked her up and put her in a sitting position when two police officers came along in a car; that the child ran away and the man who was waiting for a street car with plain-tilt went to look for her when plain-tilt was put in the second car. He says he noticed when plain-tilt was lifted up that one of her fingers came off; that a man on the street picked it up and handed it to him; that the finger was picked up near the front step; that two police officers came within three minutes after the accident; and when he lifted her plain-tilt he was alone in front seat of the second car. The street car was about 40 feet long; it was at this time lighted up. He says that when plain-tilt was picked up she seemed to be unconscious, and he says that he examined the ground where she fell; that there was a police with her in it and the fee was returned.

None of these, a house to house canvasser, was at this time lived at 3807 Normal boulevard, testified that plain-tilt at the time of the accident she was walking north on the east side of Normal boulevard on her way to a drugstore on the northwest corner of the intersection; that she saw the street car coming and saw plain-tilt with her little girl; that plain-tilt was on the street walking to the east; that when the street car stopped she (witness) crossed the street

the accident she was walking north on the east side of Normal boulevard

to the north in front of the street car and turned around to see if her husband was getting off the street car; she says she saw plaintiff put the little girl on the rear platform of the car and saw her start to get on the car herself; that she had one foot on the platform, but that she didn't know whether plaintiff's hand was on the car when the street car started with a jerk and threw her to the street, and that plaintiff fell with her feet toward the north curbing. The witness says that it was a dark night and "you could not see everything just exactly, just so plain;" that she saw the conductor get off the back platform to help plaintiff up; that witness then hurried across the street and saw no more of the accident; she got some medicine at the drugstore and then crossed the intersection on the west side of the street; she did not see the motorman step out of the car and did not notice whether the motorman opened the front door; he would have been about three feet from her, she says, if he had done so; she did not notice any police car or squad; she did not see anyone take plaintiff away; she didn't give her name to anyone, and she didn't see any man standing there ready to get on the car; in brief, she says she did not see anyone "except the lady and the little girl." She says that plaintiff's feet were toward the north curb and her head near the rear wheels of the street car; that the child screamed with fright and stuck her head out of the door of the street car. Witness did not go near the lady who was hurt; she didn't know whether anybody took care of the child; she lived near this corner one year and saw about eight accidents at the corner in two of which people were killed.

Mrs. Gertrude Sullivan, who lived on the first floor of the frame building at the northeast corner of the intersection (the side of the house faced 39th street, the front faced Loyal boulevard) said she was having dinner about this time, heard a child scream but didn't pay any attention to it for a few minutes, when

to the north is toward of the street car and turned around to see  
if her husband was getting off the street car; she says she saw  
plaintiff get the little girl on the rear platform of the car and  
saw her start to get on the car herself; that she had one foot on  
the platform, but that she didn't know whether plaintiff's hand  
was on the car when the street car started with a jerk and threw  
her to the street, and that plaintiff fell with her feet toward the  
north curbing. The witness says that it was a dark night and "you  
could not see everything just exactly, just as plain;" that she  
saw the defendant get off the back platform to help plaintiff up;  
that witness then hurried across the street and saw no more of the  
accident; she got some medicine at the drugstore and then crossed  
the intersection on the west side of the street; she did not see  
the defendant again until she got back and did not notice whether the  
defendant opened the front door; she would have been about three feet  
from her, she says, if he had done so; she did not notice any police  
car or wagon; she did not see anyone leave plaintiff's way; she didn't  
give her name to anyone, and she didn't see any one standing there  
ready to get on the car; in brief, she says she did not see anyone  
except the lady and the little girl. She says that plaintiff's  
feet were toward the north curb and her head near the rear wheels  
of the street car; that the child came down with fright and struck  
her head out of the door of the street car. Witness did not go down  
the lady who was hurt; she didn't know whether anybody took care of  
the child; she lived near this corner one year and saw about eight  
accidents at the corner in two or three years were killed.

Q. Now, witness testified she lived in the first block of the  
third building at the northeast corner of the intersection (the  
first of the street facing north street, the first block between the  
third and fourth streets) and was looking toward about this time, heard a child  
scream but didn't pay any attention to it for a few minutes, when



she looked out from the back bedroom window and saw the car standing there and saw a woman being picked up "from the back end of the street car." She says: "I didn't see the child at that time. \*\* All I could see, just that they were carrying her to the machine." She says that a few feet from the end of the car she noticed a shoe; that her mother went to the front of the house to see what had become of the child; there was an arc light on the corner; she was not able to identify plaintiff or the persons who picked her up. She says she saw the forms of people picking her up and that they carried her to a machine that was standing in back of the street car a little ways and facing west; she saw some bundles on the curb; the shoe, she says, was lying four or five feet from the rear steps of the car. The mother of this witness testified that she heard the child scream but did not see anything.

Ralph Stoner, a floor manager of the A. & P. Co. store at 505 West 59th street, west of Bernal boulevard, went to the intersection with another employee to take the street car; he noticed that the street car had no crew and saw the car from the south side of 59th street; he identifies the time as being twenty minutes to seven; he saw a pair of ladies' slippers alongside the street car, about the middle of it; he says the street car was standing at the regular place; there were some passengers in it; the slippers were a little back of the center on the north side of the street car and so far as he knew the automobile that took plaintiff away had already gone when he arrived.

Joseph Thomas, a clerk in the same store, left the store with Stoner and ran with him, as he says, to get to the street car; there was, he says a crowd around the back end of the street car, and he saw some fellows picking the woman up and carrying her around the back end of the street car to the squad car. As he and his companion approached the scene of the accident the car was between them



she looked out from the back bedroom window and saw the car standing  
there and saw a woman getting in. "That's the car," she said. "I  
don't see the child at that time. All I could see, that that  
car was carrying her to the hospital." The nurse then a few days  
and out of the car she noticed a shot. That her mother went to the front of the house to see what had  
come of the child; there was an old light on the corner; she was not  
able to identify himself or the persons who picked her up. She  
says she saw the father of people picking her up and that they car-  
ried her to a machine that was standing in back of the street car  
a little ways and facing west; she saw some building on the curb;  
she saw, she says, was lying down or lying face down the rear steps  
of the car. The mother of this witness testified that she heard the  
child scream but did not see anything.

John Brown, a floor manager of the A. & P. store at  
225 West 12th street, west of Central boulevard, went to the inter-  
section with another employee to take the street car; he noticed  
that the street car had no crew and saw the car from the south side  
of 12th street; he identifies the line as being twenty minutes to  
seven; he saw a girl of fifteen, slightly misshapen the street car,  
about the middle of it; he says the street car was standing at the  
regular place; there were some passengers in it; the sidewalk was a  
little back of the corner on the north side of the street car and  
up far as he knew the automobile that took plaintiff away had  
already been removed.

Joseph Brown, a clerk in the same store, left the store  
with Brown and ran with him, as he says, he got to the street car;  
there was, he says a crowd around the store and at the street car,  
and he saw some fellow riding the wagon up and carrying her across  
the back end of the street car to the ground car. As he and his car-  
riage approached the scene of the accident, the car was between them

and the people on the north side of it; he couldn't see anybody on the north side and couldn't say whether there were any slippers lying there but was sure Stoner did not pick them up. He didn't know anything that was going on until the crowd gathered; he saw the police squad take plaintiff away.

This is the substance of testimony of witnesses called to corroborate the narration of the plaintiff.

Corroborating the testimony of Walsh, the motorman, is that of the conductor Krause. Krause says that he alone was on the back platform of the street car at the time of this occurrence; that he felt a sudden jar; that he looked out when the car stopped and saw his motorman down in the street with a man picking up a woman; that they were a little east of the front step; that he went right up to them and helped her get up; he says positively that no one got on the step or platform at the rear of the car; that a police officer came along and said that a squad car was there, and that they took her to the squad car which was in the rear of the street car; that he, with the two officers and the woman, rode in the squad car to St. Bernard's hospital; he says he did not see the little girl there; that when the street car stopped the front end was about 20 or 25 feet east of the crosswalk; that he didn't know whether there was any ice or snow on the street at this time.

Mr. Murphy, a policeman, testified that on that night he was driving a squad car east on the south side of 55th Street; that Officer Hagan was with him, and that as they approached Normal Boulevard the signal light was red; that he came almost to a complete stop and looking in both directions he saw there was no traffic and continued east; that looking north he saw a lady, a child and a man standing on the northeast corner of the intersection, waiting, as he supposed, for a street car which was approaching from the east; that when the squad car was about the middle of the side of

and the people on the north side of it; he couldn't see anybody on the north side and couldn't say whether there were any lights. Telling there was was wrong and he was sure of it. He didn't know anything that was going on until the crowd gathered; he saw the police and they started to go.

This is the substance of testimony of witnesses called to corroborate the narrative of the plaintiff.

Concerning the testimony of John, the defendant, is that of the coroner's inquest. John says that he alone was on the back of the car at the time of this occurrence; that he took a sudden jump; that he looked out when the car stopped and saw his motorcycle down in the street with a man picking up a woman; that they were a little west of the front steps; that he went right up to them and helped her get up; he says positively that he was not on the steps or platform at the rear of the car; that a police officer came along and said that a woman was there, and that they took her to the square car which was in the rear of the street car; that he, with the two witnesses and the woman, rode in the square car to St. Bernard's hospital; he says he did not see the little girl there; that when the street car stopped the front and was about 10 or 12 feet east of the crosswalk; that he didn't know whether there was any one on the street at this time.

Mr. Morphy, a policeman, testified that on that night he was driving a patrol car east on the south side of 60th street; that Officer Quinn was with him, and that as they approached Central Boulevard the signal light was red; that as they came almost to a complete stop and looking in both directions he saw there was no traffic and continued east; that looking north he saw a lady, a child and a man standing on the northeast corner of the intersection, waiting, as he supposed, for a street car which was approaching from the east; that when the signal was green the lights in the car



the street car he heard a scream and stopped at the east end of the street car; that after Officer Hagan got off he pulled the squad car down to the alley on the north side of 99th street, backed up and drove west, when he saw Officer Hagan, the street car conductor and a citizen carrying a woman back toward the back end of the street car; that they put her in the squad car; he says that the citizen said the child ran north onormal boulevard. This witness also said that the front end of the street car was about 15 feet east of the crosswalk.

Officer Hagan testified that Murphy was driving the squad car at the time in question; that the first thing that attracted his attention after they had passed the street car was a person's scream; that Murphy then drove to the east end of the street car, and he (witness) got out of the squad car and went around the east end of the street car to the north side, and that somewhere between the center and the front of the street car were the conductor, the motorman and another man by the name of Schooley; that they asked for an ambulance; that he told them the squad car was there; that the woman was carried back to the squad car which Officer Murphy had turned around; that they took the woman from some position between the front and the center of the street car back to the rear and put her in the squad car; that Schooley was the only witness whose name they got; he says they had a plain, unobstructed view of the street and didn't see the street car hit anybody; that the street was well lighted, and that there was a boulevard light on the corner; that they saw nobody knocked down by the street car, did not hear any grinding of brakes nor bell sounded by the street car but just heard a scream when the car had not yet come to a stop; he thought it was a lady screaming; he could not say whether plaintiff was conscious or not when she was carried.

Marion Schooley testified that he was a foreman of the

the street car he heard a woman and stopped at the curb and at  
the street car, and after waiting a moment he saw a woman  
stepped out from the curb and walked on the north side of both streets,  
backed up and drove west, when he saw Officer Hanson, the street  
car conductor and a witness carrying a woman back toward the back  
end of the street car; that they saw her in the street car; he  
says that the witness said the woman was riding on normal boulevard.  
This witness also said that the front end of the street car was  
about 15 feet east of the intersection.  
Officer Hanson testified that during the period the street  
car at the time in question; that the time being that afternoon  
his attention after they had passed the street car was a person's  
behind; that Hanson then drove to the east end of the street car,  
and he (Hanson) got out of the street car and went around the  
east end of the street car to the north side, and that somewhere  
between the street and the front of the street car were the con-  
ductor, the woman and another man by the name of Kennedy; that  
they asked for an ambulance; that he told them the street car was  
there; that the woman was carried back to the street car which  
Officer Hanson had turned around; that he saw the woman there  
some position between the front and the center of the street car  
back to the rear and put her in the second car; that Kennedy was  
the only witness whose name they met; he says they had a glass.  
Unobstructed view of the street and Hanson's view of the street car was  
obstructed; that the street was well lighted, and that there was a  
street light in the street and that the street light was  
by the street car. He did not hear any shouting or shouting and  
was not seen by the street car but that he heard a woman when the car had  
not yet come to a stop; he thought it was a lady screaming; he  
would not say whether Kennedy was conscious or not when she was  
carried.

Officer Hanson testified that he was a foreman of the

New York Central railroad; that at the time in question he was at the northeast corner of 59th street and Normal Boulevard waiting for a street car going west; that as the car approached he stood 25 or 30 feet east of the crosswalk of the street; that there was a woman and a child waiting there close to him; that when he first saw them they were at the curb, and that when the car was coming plaintiff passed him about three feet to the east; that she slipped and fell in front of the car when it was about three feet from him, and that when she fell and hit the pavement the car was so close it hit her practically at the same time; that when the car stopped she was under the step of the car, or practically under the front step, and that they pulled her out on the pavement; he estimated that the car went about five feet after it came in contact with her body, and that when the car came to a stop the front end was about 25 feet from the east crosswalk of Normal Boulevard; he says the motorman got off the side he (witness) was on; that he and the motorman took her out; that he saw nobody else right there at the time; that the next persons who came were the people who got off the street car; that the conductor came, and that the policeman, the conductor and he (witness) took plaintiff into the squad car; that he gave his name and address to the conductor, the motorman and the police officer; that in helping plaintiff they took her along the north side of the street car and put her into the squad car, which was at the rear of the street car; that he looked at the place where she appeared to slip and found a dent or hole; he says "It wasn't what you call a hole either, in the pavement, a thin coat of ice in the bottom of this hole;" that he lacked to determine what made her fall. He says he was getting ready to move from 5941 Normal Avenue that night; that he had a couple of bundles of clothes with him; that he did not actually leave the place that night but stayed there that night and the following day.



New York Central Railroad; that at the time in question he was at  
the northeast corner of 42nd Street and Third Avenue; that  
for a street car going west; that as the car approached he stood  
25 or 30 feet west of the sidewalk of the street; that there was  
a crowd of people standing there; that when the car was coming  
and then they were at the curb, and that when the car was coming  
directly passed him about three feet to the east; that the driver  
and tell in front of the car when it was about three feet from him,  
and that when the car was about three feet from him he was about  
it was not directly at the same time; that when the car stopped  
he was under the step of the car, or practically under the front  
step, and that they pulled her out on the pavement; he estimated  
that the car was about five feet after it came in contact with  
her body, and that when the car came to a stop the front end was  
about 25 feet from the east crosswalk at Avenue Boulevard; he says  
the policeman got off the side of the car; that he and the  
policeman took her out; that he saw nobody else there at the  
time; that the next persons who came were the people who got off  
the street car; that the conductor came, and that the policeman,  
the conductor and he (witness) took directly into the street car;  
that he gave his name and address to the conductor, the policeman  
and the police officer; that in helping directly they took her  
along the north side of the street car and put her into the street  
car, which was at the rear of the street car; that he looked at the  
place where she appeared to slip and found a hole in the sidewalk;  
"it wasn't what you call a hole either, in the pavement, a hole  
cost of ice in the bottom of this hole;" that he looked to determine  
what made her fall. He says he was going ready to move from  
20th Avenue Avenue that night; that he had a couple of bottles of  
alcohol with him; that he did not remember seeing the place where  
she fell the night before and the following day.

Plaintiff testified further than already related that in the accident she hurt the big toe of the right foot; that she lost both of her slippers; that the toe injury was the only injury to her feet; she said she didn't know whether there was any injury to the legs, but afterward said there was an injury to the eye, the neck and the back.

She was injured on Wednesday night, was then taken to St. Bernard's hospital where she stayed until Friday morning when she was removed to the Evangelical hospital. She said that a doctor took care of her at St. Bernard's; that she did not know that he was Dr. Porterfield. Four or five stitches were taken in her toe. The Doctor did not do anything else for her and said she wasn't hurt. She said she had a cut or bruise over her right eye. When she went to the Evangelical hospital Dr. Winberg took care of her.

Dr. Porterfield, who examined plaintiff at St. Bernard's hospital testified that she eye reflexes, the tongue, mouth, chest and lower extremities were examined, and found that she had a hematoma over the right eye, an abrasion over the bridge of her nose, a bruised left shoulder, abrasions of both knees, a deep severe laceration of the right big toe, and that these were all the evidences of recent injuries. He says she had a typical arthritis deformans, had limited motion in both knees and a stiff right elbow; that the hands were characteristically deformed for arthritis deformans. He explained that by hematoma he meant discoloration. He further testified that there was no injury to the eye; that she was not unconscious while he saw her; that both pupils reacted to light and accommodation. The nervous system reacted normally to tests; the bladder and the bowels functioned normally. He says that when she left she told him she was going to the County hospital to save expense; he also says he inquired of her as to how the accident happened; she told him she was waiting for a westbound street

accident and hurt the tip toe of the right foot; that she lost both  
of her fingers; that the toe injury was the only injury to her  
foot; she said she didn't know whether there was any injury to the  
leg, but afterward said there was no injury to the leg, the neck  
and the back.

She was injured on Wednesday night, was then taken to St.  
Bernard's hospital where she stayed until Friday morning when she  
was removed to the Evangelical hospital. She said that a doctor  
look care of her at St. Bernard's; that she did not know that he  
was Dr. Forsterling. Four or five children were taken to her too.  
The doctor did not do anything else for her and said she wasn't  
hurt. She said she had a cut or bruise over her right eye. When  
she went to the Evangelical hospital Dr. Winchert took care of her.  
Dr. Forsterling, who examined plaintiff at St. Bernard's  
hospital testified that the eye reflexes, the tongue, mouth, throat  
and lower extremities were examined, and found that she had a  
hematoma over the right eye, an abrasion over the bridge of her  
nose, a bruised left shoulder, abrasions of both knees, a deep  
severe laceration of the right big toe, and that there were all the  
evidences of recent injuries. He says she had a typical arthritis  
hematoma, had limited motion in both knees and a stiff right wrist;  
that the hands were characteristically deformed for arthritis  
deformans. He explained that my hematoma he meant inflammation.  
He further testified that there was no injury to the eye; that she  
was not unconscious while he saw her; that both pupils reacted to  
light and accommodation. The nervous system reacted normally to  
tests; the bladder and the bowels functioned normally. He says  
that there was left and right arm was taken to the County hospital  
he says nothing; he also says he inquired of her as to how the neck  
felt; that she said she was waiting for a wheelchair to get



car and when it approached she walked up to it and stepped in a hole or slipped and fell, and that the car hit her. He did not take any X-rays. The history at the hospital showed plaintiff suffered some pain.

Dr. Weinberger saw plaintiff for the first time on December 18, 1931. He says she complained of severe pain in the lumbar region. X-ray pictures were taken, and the battle of the experts began.

Such is a summary of the evidence on the question of liability. Both counts of the declaration were based upon the theory that plaintiff was a passenger. It is not argued that there is any liability disclosed by the evidence upon any other theory. The question here is whether the finding of liability is against the clear and manifest weight of the evidence. This court is of the opinion that it is. The briefs admit that there is perjury in this case. There is, but not as to all the witnesses. Mrs. Sullivan, Mr. Stoner and Mr. Thomas were witnesses who told the truth undoubtedly as they saw it. Plaintiff of course has an intense personal interest. If the story of her occurrence witness is true, then Walsh, Krause, Surpay, Hagan and Schooley are guilty of wilful and deliberate perjury. There is nothing in the narration they give which would justify that conclusion. On the contrary, while contradicted on some matters, they are corroborated by most of the facts and circumstances in evidence, such, for instance, as the position of the slipper which plaintiff says she lost and which was found, and also by much of the testimony of witnesses produced by plaintiff.

The testimony of Dr. Porterfield as to the condition of plaintiff's body at the time of his examination and as to her statement to him of the manner in which the accident occurred are not without some weight. Summing it up, the answer to this question depends upon whether the partial and interested story of plaintiff



corroborated by the improbable story of another occurrence witness is to be accepted as against the testimony of six witnesses disinterested as to the matter in dispute and who, as a matter of fact, give a reasonable account of the accident which is corroborated by many facts and circumstances and in many points also by disinterested witnesses produced by plaintiff. Such being the record this court must hold that the verdict is clearly and manifestly against the weight of the evidence, and the judgment must be reversed for that reason.

III. Defendants complain of instruction No. 3 given at plaintiff's request. It is as follows:

"It is the duty of common carriers to do all that human care, vigilance and foresight can reasonably do, under the circumstances and in view of the character and the mode of conveyance adopted and consistent with the practical prosecution of their business, reasonably to guard against accidents and consequential injuries to their passengers, and if they neglect to do so they are to be held strictly responsible for all consequences which flow from such neglect; while the carrier is not an insurer for the absolute safety of the passengers, it does, however, in legal contemplation, undertake to exercise the highest degree of care consistent with the practical prosecution of its business and the mode of conveyance adopted, to secure the safety of the passenger, and is responsible for the slightest neglect, resulting in injury of the passenger, if the passenger is, at and before the time of the injury exercising ordinary care for his or her own safety."

The instruction is criticized in the first place because it is said that in giving it "without qualification" the court assumed that plaintiff was a passenger and thus ignored the testimony of five witnesses who testified as to facts which, if true, showed conclusively that she was not a passenger. The instruction is not as to its form mandatory; that is, it does not in express words direct a verdict. Plaintiff says in substance that she agrees that if the instruction assumes that plaintiff was a passenger it is erroneous, but plaintiff says that it does not assume that the relationship of carrier and passenger existed, but merely states the rule of law applicable in case the jury should so find from the evidence. She cites authorities stating the rule of law, not



incorporated in the imputed story of another competent witness is to be accepted as against the testimony of six witnesses slain, reported as in the matter in dispute and who, as a matter of fact,

give a trustworthy account of the accident which is corroborated by many facts and circumstances and in many points also by disinterested witnesses known by identity. Such being the record this court must hold that the verdict is clearly and manifestly against the weight of the evidence, and the judgment must be reversed for that reason.

III. Defendant's complaint of negligence No. 3 given as

plaintiff's theory. It is as follows:

"It is the duty of common carriers to be all that human exert, vigilance and diligence can reasonably be, under the circumstances and in view of the character and the mode of conveyance and consistent with the practical necessities of their business, reasonably to guard against accidents and consequential injuries to their passengers, and it they neglect to do so they are to be held strictly responsible for all consequences which flow from such neglect; while the carrier is not an insurer for the absolute safety of the passengers, it does, however, in legal contemplation, undertake the highest degree of care consistent with the practical necessities of the business and the mode of conveyance, to secure the safety of the passengers, and it constitutes negligence, resulting in injury to the passengers, if the carrier is, at and before the time of the injury, negligent in failing to use the highest degree of care for the safety of its passengers."

The instruction is criticized in two first places because it is said that in giving it "without qualification" the court assumed that plaintiff was a passenger and thus ignored the testimony of five witnesses who testified as to facts which, if true, showed conclusively that she was not a passenger. The instruction is not as to the form of the instruction; that is, it does not in express words direct a verdict. Plaintiff says in substance that she was not a passenger at the time of the accident and that plaintiff was a passenger it is immaterial, but plaintiff says that it was not known that the defendant was negligent and passenger failed, but merely states the facts of the accident in case the jury should so find from the evidence. The court authorized stating the rule of law, not

disputed, that instructions are to be considered as a series and that omissions in one instruction which are supplied in others will be considered harmless unless there is an obvious tendency to mislead the jury; and she says that manifestly in a case where, as here, there are two irreconcilable and conflicting theories as to the manner and place of the accident, it is impossible for plaintiff to state all the law of the case embracing both of the conflicting theories in one instruction. An examination of the instructions as a whole discloses that the jury by other instructions were clearly and repeatedly informed by the court that plaintiff had alleged in her declaration that she was a passenger for hire upon the street car and that unless she had proved this by a preponderance of the evidence, she could not recover. There were at least three such instructions, while in still another instruction the jury was told that there was no change in plaintiff's declaration that she was injured as a result of falling from the street car or being struck by the front of the street car, and that if the jury believed from a preponderance of the evidence that plaintiff either fell in front of the car or was struck by the front of the street car, there could be no recovery in the case. Obviously, as defendants suggest, this criticism of the instruction would have been obviated by inserting at the beginning of the instruction a clause to the effect that "if the jury believes from the evidence that plaintiff was a passenger on the car in question, then the jury are instructed that it is the duty of common carriers," etc. Defendants cite a number of cases, some involving criminal prosecutions, where an instruction not in form different from this one was held to be misleading as assuming a controlling fact which was clearly in dispute. The cases cited are too numerous for review. People v. Schallman, 273 Ill. 564, and People v. Harvey, 286 Ill. 593, are two of these cases involving criminal prosecutions, and

disputed, that instructions are to be considered as a series and that instructions in one instruction which are applied in others will be considered harmless unless there is an obvious tendency to mislead the jury; and the jury must necessarily in a case where, as here, there are two irreconcilable and conflicting theories as to the manner and place of the accident, it is impossible for them to lift an issue and the law of the case embracing both of the conflicting theories in one instruction. An examination of the instructions as a whole discloses that the jury by other instructions were clearly and positively informed by the court that plaintiff had alleged in her declaration that she was a passenger for hire upon the street car and that unless she had proved this by a preponderance of the evidence, she would not recover. There were at least three such instructions, while in still another instruction the jury was told that there was no change in plaintiff's declaration that she was injured as a result of falling from the street car or being struck by the front of the street car, and that if the jury believed from a preponderance of the evidence that plaintiff either fell in front of the car or was struck by the front of the street car, there could be no recovery in the case. Obviously, as defendant suggests, this mischievous of the instruction would have been avoided by inserting at the beginning of the instruction a clause to the effect that "if the jury believe from the evidence that plaintiff was a passenger on the car in question, then the jury are instructed that it is the duty of common carriers," etc. Defendant also suggests that the instruction was not given in the case, and that no instruction was given which was held to be misleading as containing a controlling fact which was clearly in dispute. The case cited was for purposes for review. People v. ... 1907, 100 Cal. 100, 34 P. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.



Chicago & Alton R. R. Co. v. Rayburn, 153 Ill. 290, and Grifanhan v. Chicago Railway Co., 299 Ill. 590, are two of the cases involving civil actions where the rule has been discussed and applied. These cases are to be distinguished from those in which instructions have been held erroneous as omitting certain essential elements while directing a verdict. That is not the criticism, but the contention is that the instruction as a whole assumes a controlling and controverted fact. An instruction of this kind is not for this reason held to be reversibly erroneous in every case, but only where the reviewing court must reach the conclusion upon an examination of the whole case that it would probably mislead the jury. The fact that in such case another instruction was given stating the law correctly upon the particular matter assumed does not cure the error of such instruction. We think the instruction subject to criticism in this respect.

Defendants also contend that the instruction did not limit the application of the rule of highest degree of practicable care to the evidence to which it could be properly applied. The jury, it is said, was not advised as to when under the law a person becomes a passenger and becomes entitled to the protection of this highest degree of care. Defendants say that no other instruction advised the jury on this point, and that for aught that appears in the instruction the jury may have understood that it applied to a person who stepped up to the track for the purpose of boarding a particular car then approaching. It does not, however, appear that defendants offered any instruction on this point, and if the jury was not informed in that regard defendants are hardly in a position to complain.

Another criticism of instruction No. 3 is that while it sets forth the usual rule that a carrier is not an insurer of the absolute safety of the passenger, it qualified that rule by asserting



that the carrier was obligated to exercise the highest degree of practicable care to secure the safety of the passenger and was "responsible for the slightest neglect, resulting in injury of the passenger." It is said that the effect of that rule is to minimize and practically nullify the non-insurer rule and correspondingly enlarge the rule of highest degree of practicable care; that the rule that the carrier is not an insurer of the safety of the passenger is a limitation on the rule of highest degree of practicable care and that without the non-insurer rule a jury would be likely to extend the application of the highest degree of practicable care beyond its proper limit; that the courts have always been careful to limit the passenger rule of care so that juries will not be misled and that the non-insurer rule is intended to serve that purpose.

Defendants point out that, in the application of the rule that a plaintiff must establish his case by a preponderance of the evidence, limitation of the same by statements to the effect that a slight preponderance is sufficient has been held erroneous, and cite Reivitz v. Chicago Rapid Transit Co., 327 Ill. 207; Molley v. Chicago Rapid Transit Co., 335 Ill. 164; Wolczek v. Public Service Co., 342 Ill. 482; Bunch v. Abbott, 256 Ill. App. 33. The rules are not necessarily analogous. The preponderance of evidence rule is one applicable to all classes of cases at common law, while the non-insurer rule seems to have been developed in stating the law applicable to a particular kind of a particular class of bailments. Schouler on Bailments, Part 1, secs. 18 - 16. The rule originally did not, so far as we are informed, go so far as to make a defendant liable for the "slightest neglect." The use of that word in an instruction in a case of this kind would seem to leave very little for a jury to decide. It would (if applied to this class of cases) tend to impair the non-insurer rule. In Webber v. Chicago City Ry. Co., 267 Ill. App. 602, this court held that an instruction which





told the jury in substance that while a common carrier was not an insurer of the safety of passengers that did not "in the slightest degree" relieve the carrier of its duty to exercise the highest degree of care, etc., was erroneous, and that by such an instruction the jury would be encouraged to extend the rule requiring highest degree of care beyond the limitation of the non-insurer rule. Plaintiff points out that this court has refused to reverse where substantially similar instructions were given, as in Illinois Southern Ry. Co. v. Hubbard, 106 Ill. App. 462, where the instruction said that the carrier was an insurer of the passenger against any injury that might befall him by reason of its negligent act, while he was in the exercise of care; as in MacDonald v. Chicago Ry. Co., 210 Ill. App. 87, where an instruction stated that a carrier was responsible to a passenger for "the slightest neglect to exercise such care," and as in a still later case where this court refused to reverse for an instruction which said the carrier was obligated to use the highest degree of practical care and was "responsible for the slightest neglect resulting in injury."

We do not now hold that the use of the phrase in an instruction of this kind is in all cases reversibly erroneous. Nevertheless, we do hold that such language is subject to the criticism that it may in some cases mislead the jury and might in a case close upon the facts require a reversal.

Instruction No. 3 is further criticized, in that while holding the carrier responsible for the slightest neglect resulting in injury to the passenger, the instruction does not confine this responsibility to the negligence charged in the declaration. It is pointed out that the rule is fundamental and without exception that a plaintiff can recover only upon proof of negligence which is charged in the declaration, and that an instruction which permits a recovery on proof of negligence not charged in the declaration is

that the duty to investigate does not in  
 interest of the safety of passengers that it is the duty of the  
 "operator" to relieve the carrier of its duty to exercise the highest  
 degree of care, etc., was erroneous, and that by such an instruction  
 the jury would be encouraged to relax the high standard required  
 degree of care required the carrier of the same standard. Again  
 this point and that this case was held to require the highest  
 degree of care, as in Illinois Central R.R. v. Illinois  
Central R.R. Co., 190 U.S. 191, 14 Sup. Ct. 100, 39 L. Ed. 100, where the instruction said that  
 the carrier was an insurer of the passenger against any injury that  
 might result from its negligence, while he was in the  
 custody of the carrier; as in Illinois Central R.R. Co. v. Illinois  
Central R.R. Co., 190 U.S. 191, 14 Sup. Ct. 100, where an instruction stated that a carrier was responsible to a  
 passenger for "the slightest neglect or dereliction upon any of its  
 lines" and that the carrier was liable for any injury to a passenger  
 resulting from its negligence, which was held to be the highest  
 degree of practical care and was "responsible for the slightest  
 neglect resulting in injury."  
 It is not now held that the carrier is an insurer  
 of this kind in all cases reversibly erroneous. Nevertheless,  
 we do hold that such language is subject to the criticism that it  
 may in some cases mislead the jury and might in a case alone mean  
 the facts require a reversal.  
 Instruction No. 2 is likewise erroneous, in that it  
 states that the carrier is responsible for the slightest neglect resulting  
 in injury to the passenger, the instruction does not contain this  
 responsibility to the negligence charged in the declaration. It  
 is pointed out that the rule is fundamental and should be applied  
 that a plaintiff can recover only upon proof of negligence which is  
 charged in the declaration, and that an instruction which would  
 a recovery on proof of negligence not charged in the declaration is



erroneous. There is no doubt of this rule. Of the innumerable cases that might be cited, we refer to Batner v. Chicago City Ry. Co., 233 Ill. 169; Lyons v. Ryerson & Son, 242 Ill. 409, and Buckley v. Mandel Bros., 333 Ill. 368.

Defendants point out that in each count of plaintiff's declaration the charge is that defendants' negligence was "by their then agents and servants;" that the only negligence sought to be proved was that the car started forward with a sudden jerk, that there was no evidence tending to show what caused the car to start forward with a jerk or that it was due to anything done or left undone by the conductor or motorman; that the alleged start with a jerk may have been due to the mechanism of the car without any fault on the part of defendants' servants. They further point out, citing Chicago & Eastern Ill. R. R. Co. v. Driscoll, 176 Ill. 330 and Midland Valley R. R. Co. v. Conner, 217 Fed. 956, that presumptive negligence may not be indulged unless the declaration is broad enough to include every kind of negligence which might have caused the accident, and that otherwise the rule that recovery may be had only on proof of the negligence charged in the declaration might be violated. On the other hand, plaintiff points out numerous other instructions which covered this point and by which the jury was repeatedly told that plaintiff could not recover unless she had proved negligence as stated in her declaration, and she says that in view of the full, concise and complete instructions given, it is preposterous to argue that the jury might have in any way been misled by the instruction.

When this instruction is carefully read, however, while not directly and expressly mandatory in form, it is in substance mandatory since the jury is told that under the facts as stated defendants are "responsible." This does not in form amount to the direction of a verdict, but it is entirely possible that it would be so understood

There is no doubt of this matter. At the same time, it is not clear that the matter is not clear.

00. 888 177. 169; DATED 7 JANUARY 1961; NO. 543 177. 169. 888

THE UNIVERSITY OF CHICAGO

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then again and private; "that the only possibility is to be  
 later on the change in that direction, which would be "by this

There was no evidence leading to any other person who was in contact with the defendant at the time of the murder. The defendant was the only person who was in contact with the victim at the time of the murder.

There is no doubt that the above information was obtained from the source who provided the information to the FBI.

1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes. Once the causes have been identified, the next step is to develop a plan of action. This involves identifying the steps that need to be taken to solve the problem and determining the resources that will be needed to implement the plan. Once a plan of action has been developed, the next step is to implement the plan. This involves carrying out the steps that have been identified in the plan and monitoring the progress of the implementation. Finally, the last step in the process is to evaluate the results of the implementation. This involves determining whether the problem has been solved and whether the resources have been used effectively.

[illegible]

the fact that the Government has not been able to secure the necessary funds to carry out its program. The Government has been unable to secure the necessary funds to carry out its program. The Government has been unable to secure the necessary funds to carry out its program.

an aspect of the intelligence gathered in the investigation might be

...and the ... ..

at least once each day, notwithstanding that it is stated in some of the reports

It is noted that the jury might have in any way been mis-

THE UNIVERSITY OF CHICAGO

Below the top is the first of the two

...and it is highly probable that it would be so interpreted.

by the jury. We think the instruction is subject to criticism in this respect, but it could not mislead the jury in this case.

IV. As the judgment must be reversed, it is quite unnecessary to discuss at length other points raised in the voluminous briefs which are largely devoted to criticisms of instructions given. The jury was fully instructed from the viewpoint of both parties and at their request, and the instructions as a whole state the law in substance as it has frequently been declared by this court and the Supreme court of the State. Defendants complain of plaintiff's instruction No. 2. It seems to have been approved by this court in Reynolds v. Alton, Granite & St. L. Traction Co., 194 Ill. App. 87, also of No. 4, which seems to have been approved by the Supreme court in Peterson v. B. A. & M. Traction Co., 238 Ill. 411. They complain of plaintiff's instruction No. 8, by which the jury was told in substance that if plaintiff's injury resulted in the aggravation of a previous sickness and disability, the jury might allow damages for such aggravation. Defendants do not question that such is the general rule of law but urge it was erroneous to give the instruction in this case because the declaration did not allege such damages, which are special. A number of authorities are cited to that effect.

The instruction is taken almost verbatim from Chicago Union Traction Co. v. Bowsky, 108 Ill. App. 179. Plaintiff cites Hilliard v. Chicago Ry. Co., 183 Ill. App. 282; Simpson v. Georgia Ry. Co., 179 Ill. App. 307; Lisabury v. St. Louis & Springfield Ry. Co., 184 Ill. App. 395; Farrast v. Roper Furniture Co., 187 Ill. App. 504; all of which in substance hold that where the plaintiff was at the time of receiving an injury suffering from some disease and as a result of the injury that disease is aggravated, damages may be recovered for such aggravation. There is no doubt of that rule, which is firmly established. The precise question raised



by the jury. In giving the instruction it is subject to criticism in this respect, but it would not mislead the jury in this case.

IV. ... as the judgment must be reversed, it is given as necessary to discuss at length other points raised in the voluminous briefs which are largely devoted to criticism of instructions given. The jury was fully instructed from the viewpoint of both parties and at their request, and the instructions as a whole state the law in substance as it has frequently been decided by this court and the Supreme Court of the State. Deliberate consideration of plaintiff's instruction No. 2, it seems to have been approved by this court in Smith v. Smith, 100 Ill. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

is whether a court may instruct the jury to that effect where such damages are not specially claimed in the declaration. It seems, however, that by instruction No. 24, which was given at the request of defendants, the jury was directed upon the theory that this question was before it for consideration, and having tried the case on that theory it would seem defendants are now estopped from raising the question for the first time in this court.

Complaint is also made of plaintiff's instruction No. 8 as to damages, No. 9 as to the right of the jury to discredit the testimony of plaintiff because she was the plaintiff, and No. 11 as to the number of witnesses, and it is urged, with citation of many authorities that plaintiff's experts were permitted to base their opinions upon subjective symptoms. It is also urged that the damages were excessive. A full discussion of these points would unduly extend this opinion.

For the reasons stated, the judgment must be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

in either a party not having the right to be heard or a party not being heard. It seems, however, that by instruction 10, 11, which was given at the request of the defendant, the jury was directed upon the theory that the question was before it for consideration, and having tried the case on that theory it would have returned a verdict in favor of the plaintiff. It is not clear that the jury was directed to return a verdict in favor of the plaintiff.

Instruction 10 was also made of plaintiff's instruction 10, 11 as to damages, but it is the right of the jury to disregard the testimony of plaintiff because the law was plaintiff's, and as to the number of witnesses, and it is urged, with citation of many authorities that plaintiff's evidence was sufficient to base their opinion upon subjective evidence. It is also urged that the damages were excessive. A full discussion of these points will be found in the opinion.

For the reasons stated, the judgment must be reversed and the cause remanded for further trial.

REVEREND AND HONORABLE

THE COURT OF APPEALS, 11th circuit.



37150

In re: ESTATE OF CHARLES MACDONALD,  
deceased, ANN WALKER, Claimant,  
Appellee,

v.

EDDY LOGAN REEVES, as Executor of the  
Estate of CHARLES MACDONALD, De-  
ceased,  
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

274 I.A. 649<sup>3</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT

The executor by this appeal seeks to reverse a judgment in favor of the claimant in the sum of \$3,572.76 entered on the verdict of a jury. The cause was heard in the Circuit court on an appeal from the Probate court by the executor, the claim having been allowed in that court also.

Macdonald, the deceased, was a physician and owned a building at Oakwood boulevard and Cottage Grove avenue, in which he conducted his practice. The Drexel State bank was a tenant in that building. Dr. Macdonald kept a commercial account and also a savings account at this bank. He also used a safety deposit box rented from this bank. He owned real estate in other parts of the city and was accustomed to trade somewhat in that kind of property.

The claimant, Miss Walker, is a nurse. For more than twenty years she was closely associated with Dr. Macdonald in his professional work and also in his various financial and business transactions. She kept his books and managed in part at least some of his real estate. She occupied a flat in one of the buildings which he owned. In short, she seems to have been trusted and relied on by the doctor in all his professional and business affairs.

Dr. Macdonald died on October 31, 1931, at the West Subur-

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Court at the City of New York, this 1st day of January, 1911.

JOHN J. KELLY, an executor of the estate of JAMES KELLY, deceased.  
Counsel.

CLERK OF COURT.

2741111

IN SENATE  
JANUARY 11, 1911

The committee on this subject seems to have a judgment in favor of the claimant in the sum of \$3,377.75 entered on the report of a jury. The same was held in the circuit court on an appeal from the report of the executor, the claim having been allowed in that court.

Accordingly, the executor, who is a physician and owned a building at 123rd Street and 10th Avenue, in which he conducted his practice. The executor, James Kelly, was a tenant in that building. Mr. Macdonald kept a commercial account and also a savings account at that bank. He also used a safety deposit box rented from this bank. He owned real estate in other parts of the city and was accustomed to trade somewhat in that kind of property.

The claimant, also called, is a nurse. Her name was twenty years ago was closely associated with Mr. Macdonald in his professional work and also in his various financial and business transactions. She kept his books and managed in part at least some of his real estate. She conducted a list in one of the buildings where he lived. In short, she seems to have been trusted and relied on by the doctor in all his professional and business affairs. Of course, with no doubt at all, at the time of the

ban hospital in Oak Park. The claim of Miss Walker as filed in the Probate court is in the form of an account between Dr. Macdonald and herself, in which she charges him "by cash placed to the credit of Charles Macdonald in the Drexel State bank on October 28, 1931, and for money then had and received from said Ann Walker by the said Charles Macdonald .... \$3873.75." There are other items in the account which it seems were not allowed by the jury and which are therefore not involved in the appeal.

The claimant was incompetent to testify under the statute as to any occurrence with reference to the transaction prior to the death of Dr. Macdonald. She produced witnesses, however, whose evidence tended to show that five days before the death of Dr. Macdonald, on October 26, 1931, Miss Walker took to him in the hospital in Oak Park a certificate for 25 shares of stock in the Commonwealth Edison Co. This certificate was in her name. A photograph of it is in evidence. She at that time signed the blank form of assignment on the back of the certificate, and Dr. Whitehead, of the Commonwealth Edison Co., at that time wrote his name on it as a witness to her signature. The certificate upon its face appears to have been issued to the claimant October 15, 1931. On the day following the execution of the assignment at the hospital, the evidence shows claimant took this certificate, together with another for 25 shares in the same company issued to Dr. Macdonald and endorsed by him, to Mr. McCarthy, who was the manager of the Drexel State bank. Mr. McCarthy made out a "sell order" which Miss Walker signed. Dr. Macdonald's signature also appears on this order. This sale was thereupon executed by the bank through a broker. One of the certificates sold at \$143 a share and the other at \$143 $\frac{1}{2}$  a share. This sell order also directed the sale of a hundred shares of Insull Utilities, which, it appears, the bank likewise sold at this time at \$12  $\frac{3}{8}$  a share.



has been in the hospital in New York. The claim of Miss Baker as filed in the  
proceedings is in the form of an account between Mr. Macdonald and  
himself, in which she charges him "of each signed to the credit of  
Charles Macdonald in the Hotel State Bank on October 20, 1921, and  
for money then had and received from said Ann Baker by the said  
Charles Macdonald . . . . . \$250.00." There are other items in the ac-  
count which it seems were not allowed by the jury and which are  
therefore not involved in the appeal.

The claimant was incompetent to testify under the statute  
as to any occurrence with reference to the transaction prior to the  
death of Mr. Macdonald. The produced witnesses, however, those ex-  
cluded seemed to have said five days before the death of Mr. Macdon-  
ald, on October 20, 1921, Miss Baker took to him in the hospital in  
New York a certificate for \$5000 of cash in the Commonwealth  
Bank. This certificate was in her name. A photograph of it is  
in evidence. It is not clear from the facts how it came  
on the back of the certificate, and Mr. Macdonald, at the Common-  
wealth Bank Co., at that time wrote his name on it as a witness to  
her signature. The certificate upon its face appears to have been  
issued on the 15th of October 1921. On the day following the  
execution of the assignment of the hospital, the evidence shows  
Macdonald took this certificate, together with another for \$5000  
in the same amount issued to Mr. Macdonald and delivered by him, to  
Mr. Macdonald, who was the manager of the Hotel State Bank. Mr. Mac-  
donald made out a "cash order" which was signed by him. Mr. Macdonald  
also signed the cash order. This cash order was thereupon  
presented to the bank through a broker. One of the certificates was  
at that time and the other attached a share. This cash order also  
attached the cash of a limited amount of small currency, which, in  
evidence, the bank certificate was at that time of the \$2500 amount.

The proceeds after deducting charges amounted to the sum of \$9,369. No part of this sum was paid to Miss Walker, and all the money realized from these sales was deposited to the accounts of Dr. Macdonald in the bank.

When Mr. McCarthy was on the witness stand he was asked by the attorney for plaintiff to state the conversation with Miss Walker at the time this deposit was made. The attorney for the executor objected, and the objection was sustained. Because it was a part of the actual transaction, we think the verbal statement which accompanied the act of depositing this money should have been admitted in evidence. On cross examination the banker was asked by the attorney for defendant if the proceeds were deposited in the account of Dr. Macdonald at Miss Walker's request. The attorney for claimant objected, stating that if that question was allowed he would then insist that the whole conversation should be received. Thereupon, the attorney for the executor withdrew the question. Thus evidence was kept out which should have been admitted and which it is fair to infer would have been favorable to claimant. On the evening of the day Dr. Macdonald died, James Macdonald his son, Gertrude, his daughter, Miss Walker and a Mr. Arniger, were present. Mr. Arniger says he suggested to James Macdonald that if the doctor had securities or money in the bank it would be well to get them out before the bank was aware that the doctor had passed away. It was stated that the doctor had money on deposit in the bank and that the daughter Gertrude had power of attorney to sign checks. Thereupon, Mr. Arniger had Gertrude draw a check in blank and headed it to Miss Walker. On the following day, Sunday, Miss Walker was at dinner at the home of Mr. Arniger, and the testimony is that after dinner claimant took from a bag, money amounting to \$9,726.01. Arniger testified that claimant placed this money on the table saying that most of Dr. Macdonald's money was in

The proceeds after deducting charges amounted to the sum of \$2,383. No part of this sum was paid to Miss Walker, and all the money was-  
 lost from these sales was deposited to the account of Dr. Macdonald  
 in the bank.

Then Mr. Macdonald was on the witness stand he was asked by  
 the attorney for plaintiff to state the conversation with Miss Walker  
 at the time this deposit was made. The attorney for the executor ob-  
 jected, and the objection was sustained. Because it was a part of the  
 usual testimony, as from the usual statements which were made  
 the act of depositing this money should have been admitted in evidence  
 on cross examination the banker was asked by the attorney for defend-  
 ant if the proceeds were deposited in the account of Dr. Macdonald at  
 this bank's bank. The attorney for plaintiff objected, stating  
 that if that question was allowed he would then insist that the whole  
 conversation should be received. Thereupon, the attorney for the  
 executor withdrew the question. Then evidence was kept out which  
 should have been admitted and which it is fair to say would have  
 been favorable to plaintiff. On the evening of the day Dr. Macdonald  
 died, James Macdonald, his son, testified, the executor, Miss Walker  
 and a Mr. Walker, were present. Mr. Walker says he suggested to  
 James Macdonald that if the doctor had securities or money in the  
 bank it would be well to get them and before the bank was aware that  
 the doctor had passed away. It was stated that the doctor had money  
 on deposit in the bank and that the executor, George and James  
 attended at the bank. The witness, Mr. Walker, did not know how  
 much in bank was taken out as Miss Walker, on the following day,  
 would, also testify that of the sum of \$2,383, \$2,000, and  
 the testimony is that these figures should have been admitted in  
 evidence to the jury. The witness testified that plaintiff lost this  
 money on the table saying that most of Dr. Macdonald's money was in



the savings account. The witness says:

"I said that I was surprised at the amount of money and Miss Walker said that Dr. Macdonald happened to have so much money from the sale of some stock -- whether she said Commonwealth Edison, Insull Investment or what, I don't know positively, but she stated that the stock had just been sold and the doctor had not had a chance to reinvest it; that it was the proceeds of the sale of stock the doctor had gotten in James and Gertrude's name and in Miss Walker's name owing to being unable to get more than 35 shares in his own name; but he wanted all he could get and consequently he took it in these different names."

The money was placed in a large envelope and given to Mrs. Armiger for safekeeping until Monday morning. The witness said on cross examination that he had suggested that Miss Walker get this money from the bank as she was well known there, and that he told Miss Walker that as soon as the bank learned the doctor was dead it would seal the vault; that the children needed money at once for funeral and hospital bills, because they were orphans and had no funds of their own. This money was afterwards turned over to the executor.

James Macdonald testified that he had a conversation with the claimant on October 31st at the hospital after his father died when Mr. and Mrs. Armiger, Gertrude and a Miss Deal were present; that they all drove over to the Oak Park Savings bank; that on the way Miss Walker said that Gertrude had a joint checking account at the Oak Park Savings bank, and that the money there could be obtained; that later in the day at the home of Mr. Armiger, Miss Walker said that his sister, Gertrude, had a joint checking account with his father and that Gertrude could draw the money out of the bank by signing a blank check; that Gertrude thereupon signed a check in blank and handed it to Miss Walker who put it in her purse; that he next saw claimant on November 1, 1931, at lunch time at Armiger's home, and that after lunch Miss Walker took an envelope from her purse saying that it contained the money she had taken from the Brexel State bank; that when it was opened Mr. Armiger expressed surprise at the amount of money and asked Miss Walker how it happened;

"I said that I was surprised at the amount of money and Miss Walker said that Mr. Woodhouse had happened to have no money left from the sale of some stock -- whether she said 'some' or 'a lot' I don't know -- but I don't know what the stock had just been sold and given, but she stated that the stock had just been sold and the money had not been given to Mr. Woodhouse; that it was the proceeds of the sale of the stock that the doctor had given in the bank and that the money was in the bank and that the money was being made in the bank and that the money was being made in the bank and that the money was being made in the bank and that the money was being made in the bank."

The money was placed in a large envelope and given to Mr. Walker. For safekeeping with money holdings. The witness said on cross examination that he had suggested that Miss Walker put this money from the bank as she was well known there, and that he told Miss Walker that as soon as the bank learned the doctor was dead it would send the money; that the children needed money at once for funeral and medical bills, because they were without any money at the time. This money was afterwards turned over to the executor. James Woodhouse testified that he had a conversation with

the claimant on October 14th at the hospital after his father died when Mr. and Mrs. Walker, Gertrude and a Miss Woodhouse were present; that they all drove over to the new first savings bank; that on the way Miss Walker said that Gertrude had a joint checking account at the bank and that the money there could be obtained; that later in the day at the home of Mr. Walker, Miss Walker said that Miss Walker, Gertrude, had a joint checking account with his father and that Gertrude could draw the money out of the bank by signing a check; that Gertrude thereupon signed a check in blank and handed it to Miss Walker who put it in her purse; that the next day Walker on November 1, 1933, at lunch time at Walker's home, and that after lunch Miss Walker took an envelope from her purse which she is convinced she knows she put in her purse. Walker thereupon said that when it was opened the money was contained in the envelope of money and when Miss Walker put it in her purse.



that "Miss Walker told us that my father had ordered her to sell 25 shares of stock in the Commonwealth Edison Company in his name and 23 shares of stock which were in her name which he had paid for." James Macdonald further said: "As my father had bought all of the Commonwealth Edison stock that he could from a man by the name of Whitehead, who was selling the stock two or three dollars below the market price, and that Mr. Whitehead was not allowed to sell more than 25 shares to any single customer, and for that reason he had put 25 shares in Miss Walker's name. Miss Walker then said that he ordered her to sell the stock in his name and in Miss Walker's name and to put the money in the account at the Brexel State bank, and that was the reason there was so much money there."

Ruth Neal, witness for defendant, testified in substance that she had a conversation with Miss Walker on October 31, 1931, at about ten o'clock in the morning at the West Suburban hospital, immediately after the death of Dr. Macdonald; that Miss Walker was gathering up the effects of the doctor and said she had some expense in certain business matters and the doctor had been very anxious to pay her the money and had offered her a check for her salary, but that Miss Walker told him that she didn't need the money as on the first of the month she would be collecting the rent and she could take what money she needed and that Dr. Macdonald didn't owe her anything.

The claimant being a competent witness as to matters which occurred after the death of the doctor, testified in rebuttal that she did not have a conversation with Miss Neal in Dr. Macdonald's room at the hospital, and that she did not make any statement to the effect that the doctor did not owe her any money or that he had paid her everything. She said she was at the home of Arniger on the evening of October 31st and that she showed James Macdonald the amount of money she had in the envelope and that he remarked there was a lot of it and asked her where it came from; that Mr. Arniger went to Dr.



that "Miss Walker told me that my father had ordered her to sell 25 shares of stock in the Commonwealth Edison Company in his name and 25 shares of stock which were in her name which he had paid for." James Macdonald further said, "As my father had bought all of the Commonwealth Edison stock that he could from a man by the name of Mitchell, who was selling the stock two or three dollars below the market price, and that Mr. Mitchell was not allowed to sell more than 25 shares to any single customer, and for that reason he had not 25 shares in the father's name. Miss Walker then said that he ordered her to sell the stock in his name and in the father's name and to put the money in the account at the Royal State Bank, and that was the reason there was so much money there."

Edith Hall, witness for defendant, testified in substance that she had a conversation with Miss Walker on October 31, 1931, at about ten o'clock in the morning at the last address he left at, immediately after the death of Mr. Macdonald; that Miss Walker was gathering up the effects of the doctor and said she had some expense in carrying business matters and the doctor had been very anxious to pay her the money and had offered her a check for her salary, but that Miss Walker told him that she didn't need the money as on the first of the month she would be collecting the rent and she could take what money she needed and that Mr. Macdonald didn't owe her anything.

The statement being a competent witness as to matters which occurred after the death of the doctor, testified in substance that she did not have a conversation with him until he was in the hospital, and that she did not make any statement to the effect that the doctor did not owe her any money or that he had paid her everything. She said she was at the home of Walker on the evening of October 31st and that she showed James Macdonald the amount of money she had in the envelope and that he remarked there was a lot of it and asked her what it was from; that Mr. Macdonald went to Mr.

Macdonald's home and took the envelope with the money to his home; that the money was taken out of the envelope and that she said: "You must remember 25 shares of this stock is mine; I have my receipt to show you. Your father was ill; the checking account was low; the savings account was low. The doctor advised me -- he was my banker, he advised me to sell and put \$1000.00 in the checking account and the other in the savings account and he said: 'I will take care of you next week.'" She denies that she said at that time that the doctor had bought stock in his name and in the names of James, Gertrude and herself because he could not get so much stock in his own name and denies that she said that the doctor had bought as many shares of stock as possible in his own name but could not get any more and had purchased 25 shares in her name in order to get them two or three dollars cheaper. She says that she did say that Gertrude had a joint account with the doctor in the Mercantile State Bank; that Mr. Armiger suggested that Gertrude write out a check, sign it and withdraw the money from the savings account; that Gertrude signed her father's name and right below she signed her name and that check was used.

Mr. Armiger on surrebuttal denied that Miss Walker had said to him in his home on November 1, 1931, "You must remember that 25 shares are mine," and James, also testifying on surrebuttal, denied that she had said that.

Because of this divergent testimony the evidence as to the purchase of this stock in Miss Walker's name becomes important.

Mr. Steele, an employee of the Commonwealth Edison company, had known Dr. Macdonald for twenty years and also knew Miss Walker well. He testified that in 1931 he talked with them in the presence of each other about the purchase of Commonwealth Edison stock. He says: "Miss Walker was present and the doctor said that she said that she was unable to buy any stock at the present time,

Macdonald's name and took the envelope with the money to his home;  
 that the money was taken out of the envelope and that she said: "You  
 must remember 25 shares of this stock is mine; I have my receipt to  
 show you. Your father was ill; the checking account was low; the  
 savings account was low. The doctor advised me -- he was my banker,  
 he advised me to sell and put \$100.00 in the checking account and  
 the other in the savings account and he said: 'I will take care of  
 you next week.'" She denied that she said at that time that the  
 doctor had bought stock in his name and in the name of James, her  
 friends and herself because he could not get so much stock in his own  
 name and denied that she said that the doctor had bought so many  
 shares of stock as possible in his own name but could not get any  
 more and had purchased 25 shares in her name in order to get them  
 two or three dollars apiece. She says that she did say that her  
 friends had a joint account with the doctor in the Federal State bank;  
 that Mr. Knicker suggested that someone write out a check, when it  
 was written the money from the savings account was withdrawn  
 signed her father's name and right below she signed her name and  
 that check was cashed.  
 Mr. Knicker on cross-examination denied that Miss Walker had  
 said to him in his home on November 1, 1931, "You must remember that  
 25 shares are mine," and James, also testifying on cross-examination, de-  
 nied that she had said that.  
 Because of this divergent testimony the evidence as to  
 the purchase of this stock in Miss Walker's name becomes important.  
 Mr. Knicker, an employee of the Commercial Union Trust  
 Company, was called by the defense for direct testimony and also cross-ex-  
 amination. He testified that in 1931 he talked with them in the  
 presence of some other person and the doctor said that  
 she said that she was unable to buy any stock at the present time,



and the doctor said that he was using her money; he said that he had to take care of the children at school." He further testified that he saw the doctor again about three weeks before he died -- about October 10th or 12th and "he told me that he couldn't buy any stock as he already purchased from Mr. Whitehead."

It seems that at this time the Utility Securities company was acting as selling agent for stock of the Commonwealth Edison company and that the employees of the company were used as agents in making these sales. Mr. Whitehead was an employee of the Utility Securities company and effected the actual sale of this stock, on October 8, 1931. Dr. Macdonald bought 25 shares for each of his children and 25 shares for himself. Twenty-five shares were sold to the claimant Ann Walker. A memorandum as of that date was issued on contract No. 5146, which is in evidence as claimant's Exhibit 3. It shows the purchase of 25 shares of Commonwealth Edison company stock at the price of \$156 a share, or a total of \$3475, and states that the stock when fully paid is to be issued to "Anne Walker, 765 Oakwood Blvd., Chicago, Ill." The name of "Anne Walker" is signed thereto as purchaser. The memorandum shows an agreement to purchase stock; to pay cash within thirty days; the receipt of \$325, a statement that the sale was made by Whitehead, and the approval of the Utility Securities company dated October 12, 1931.

Whitehead testified that the longhand writing on the memorandum was his, and that the memorandum was prepared on October 8, 1931, in Dr. Macdonald's office; that on October 9, 1931, he again called at the office of Dr. Macdonald and asked him for an affidavit that the 25 shares of stock to be placed in Miss Walker's name was actually her own; that Dr. Macdonald replied that it was Miss Walker's money, but that he would give an affidavit, which he wrote and took to the next room where it was typed; that when it was returned to Whitehead it had been signed by Miss Walker and the seal of the notary put upon it. The original appears in the record

and the doctor said that he was waiting for -- -- -- -- --  
 to take care of the children at school. The further testified that  
 he saw the doctor again about three weeks before he died -- -- --  
 October 10th or 12th and he told me that he couldn't buy any stock  
 as he nearly gave up his life.

It seems that at this time the Utility Securities com-  
 pany was acting as a selling agent for stock of the Commonwealth Edison  
 company and that the employees of the company were used as a  
 means in making these sales. Mr. Whiteland was an employee of the  
 Utility Securities company and testified the actual sale of this  
 stock, on October 8, 1931. Mr. Macdonald bought 25 shares for each  
 of his children and he bought 100 shares for himself. These shares were  
 sold to the plaintiff and father. A memorandum as of that date was  
 issued on contract no. 3148, which is in evidence as plaintiff's ex-  
 hibit 2. It shows the purchase of 25 shares of Commonwealth Edison  
 company stock at the price of \$135 a share, or a total of \$3375, and  
 states that the stock when fully paid is to be issued to "Anne Mac-  
 donald, 735 Belmont Ave., Chicago, Ill." The name of "Anne Macdonald"  
 is a good enough as purchaser. The memorandum shows an agreement  
 to purchase stock; to pay cash within thirty days; the receipt of  
 \$3375, a statement that the sale was made by Whiteland, and the ap-  
 proval of the Utility Securities company dated October 12, 1931.

Whiteland testified that the foregoing writing on the  
 memorandum was his, and that the memorandum was prepared on October  
 8, 1931. He is Mr. Macdonald's witness that on October 8, 1931, he  
 called at the office of Dr. Macdonald and asked him for an  
 affidavit that the 25 shares of stock to be placed in Anne Macdonald's  
 name was actually her own; that Dr. Macdonald replied that it was  
 Anne Macdonald's money, but that he would give an affidavit, which he  
 wrote and took to the bank where it was filed; that when it  
 was returned to Whiteland it had been signed by Anne Macdonald and the  
 rest of the money was given to him. The original affidavit is the property

as Exhibit 4 and is as follows:

"To Whom It May Concern"

This is to certify that I am buying  
25 shares of Commonwealth Edison stock in my name.

(signed) Anne Walker  
765 Oakwood Blvd."

Attached thereto is the seal of a notary public.

Miss Julia Sternberger, who says that she was an employee of Dr. Macdonald at this time, doing typing, etc., was shown this exhibit and said that Dr. Macdonald wrote it on a scrap of paper and told her to copy it and that she took it into another room and copied it. She also says that on the day before, Mr. Whitehead was in the office and that Miss Walker called her to type a letter, and that the doctor said, referring to Mr. Whitehead, "This pest is sitting here again and he wants you to buy some stock." She also says that Whitehead returned the next day; that Dr. Macdonald then said that Miss Walker wanted to buy some stock, and that he was ready to give her money to buy it with; and that was when she typed the paper.

The testimony of Whitehead is further to the effect that he told Dr. Macdonald that he was limited in selling the stock to 25 shares to a customer; that such was the rule of the company, and that was the reason why he took the affidavit; that the company required him to do so. He says that the 25 shares for Dr. Macdonald, the 25 shares for his son James and 25 for Gertrude were sold on the 8th, and that the shares to Miss Walker were sold on the following day. The affidavit was requested because the advance payment on account of Miss Walker's stock was to be taken out of the checks of Dr. Macdonald. He says: "Dr. Macdonald said that he would see Miss Walker and would protect me. When I saw the doctor on October 8th he said that he did not have the money loose, but would buy some shares later on, and that for the shares sold to Miss Walker he would give his check or cash, as he was taking care of Miss Walker's payments."



as Exhibit 4 and is as follows:

"To whom it may concern,"

This is to certify that I am paying  
25 shares of Commonwealth Edison stock in my name.

(Signed) Anne Walker  
Vice President

Witnessed before me in the year of a notary public.

Miss Julia Stephenson, who says that she was an employee

of Mr. Macdonald at this time, being typist, etc., was shown this

extract and said that Mr. Macdonald wrote it on a piece of paper and  
told her to copy it and that she took it into another room and copied

it. She also says that on the day before, Mr. Macdonald was in the

office and that this paper called her to type a letter, and that the  
doctor said, referring to Mr. Macdonald, "This man is sitting here

again and he wants you to buy some stock." She also says that White-

head returned the next day; that Mr. Macdonald then said that this

paper wanted to buy some stock, and that he was ready to give her

money to buy it with; and that when she typed the paper.

The testimony of Whitehead is further to the effect that

he told Mr. Macdonald that he was limited in selling the stock to 25  
shares to a customer; that such was the rule of the company, and that

was the reason why he took the extract; that the company required

him to do so. He says that the 25 shares for Mr. Macdonald, the 25

shares for his son James and 25 for George were sold on the 23d,

and that the shares for this paper were sold on the 24th day.

The witness was requested because the witness is not an expert

in this matter's name and is not an expert in the matter of the

matter. He says: "Mr. Macdonald said that he would not give White-

head more stock. When I saw the doctor on October 23d he said

that he did not have the money to buy, but would buy some stock

later on, and that the doctor said to him - that he would give

his stock to him, as he was taking care of this paper's payment."

As a matter of fact, Whitehead had at various times before these particular transactions sold stock to the doctor and also to Miss Walker. At a prior time she purchased eight shares of the Commonwealth Edison company stock on the advice of Dr. Macdonald.

A temporary receipt upon a printed form used by the Utility Securities company was issued to Ann Walker on October 15, 1931, on contract No. 5146. The original is in the record as Exhibit 5 and states that the amount paid is \$51.50. At the bottom of the receipt appears in large type a printed notice in substance that the receipt is issued in lieu of recording payment on the invoice or security savings account book and a request to keep the receipt and when convenient to present it with invoice or security savings account book for entry.

There is evidence, too, from which the jury had a right to infer that this certificate of stock was delivered to claimant and that she held possession of same from that time until she delivered it up to the bank to be sold.

The executor contends that the fact that the proceeds of the sale were placed in Dr. Macdonald's account and therefore in his possession, creates a presumption of ownership which must be overcome before the prima facie title will be divested. He cites Martin v. Martin, 174 Ill. 371; Coffey v. Coffey, 179 Ill. 283; Chestnut v. Chestnut, 15 Ill. App. 390, and other cases. He says that the inference to be drawn from the act of plaintiff in depositing the proceeds in the sale of the stock in Dr. Macdonald's account in the bank is that he was entitled to the money and that it belonged to him. He cites Miller & Graves v. Pratz, 179 Ill. App. 294; Kinahan v. Butler, 133 Ill. App. 459. We do not understand that the law as stated in these cases is questioned by claimant. This argument of the executor, indicates a disregard of the theory of claimant's suit which is that she had a right to recover upon a quasi-contract. See Restatement of the Law, Contracts, vol. 1, sec. 5, p. 7a, where it is said: "quasi-contracts, unlike true contracts, are not based on the apparent inten-

At a prior time she purchased eight shares of the Commonwealth Edison Company stock on the advice of Dr. McDonald.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

Scientific company was issued to the United States on October 15, 1931, on contract No. 5145. The original is in the record as Exhibit 3 and states that the amount paid is \$150. At the bottom of the receipt appears in large type a printed notice in substance that the receipt is issued in lieu of recording payment on the invoice or security savings account book and a request to keep the receipt and when convenient to present it with invoice or security savings account book for entry.

There is evidence, too, from which the jury had a right to infer that this certificate of stock was delivered to defendant and that she held possession of same from that time until she delivered it up to the bank to be sold.

The executor contends that the fact that the proceeds of the sale were placed in Mr. Macdonald's account and therefore in his possession, creates a presumption of ownership which must be overcome. He also states that the time limit will be divided. He also states that the executor contends that the fact that the proceeds of the sale were placed in Mr. Macdonald's account and therefore in his possession, creates a presumption of ownership which must be overcome.

[illegible]

John William & Mary V. Smith, 170 Ill. App. 804; Kinchen v. Butler,

THE 111. 100. 400. HE IS NOT CONVICTED THAT THE LAW IS NOT IN THESE CASES IS QUESTIONED BY CLAIMANT. THIS ARGUMENT OF THE EXERCISE INDICATES A DISREGARD OF THE THEORY OF CLAIMANT'S WILL WHICH IS THAT HE HAD A RIGHT TO RECOVER UPON A quasi-contract. SEE RESTATEMENT OF THE LAW, CONTRACTS, VOL. 1, SEC. 3, P. 74, WHERE IT IS SAID: "QUASI-CONTRACTS. UNLIKE TRUE CONTRACTS, ARE NOT BASED ON THE APPLICABLE INTENT."



tion of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice." Upon that theory claimant cites Peterson v. Smith, 211 Ill. App. 431; Laflin v. Howe, 112 Ill. 253; First Nat'l. Bank v. Gatten, 172 Ill. 625. She also points out, citing Bromwell v. Bromwell Estate, 139 Ill. 424; Peabody Coal Co. v. Industrial Com. 289 Ill. 339, that the presumptions upon which defendant relies are only presumptions of fact, which in the last analysis were for the jury to consider in connection with all the evidence and not presumptions of law to be determined by the court. We think this construction is correct. Considered as a rule of evidence the fact that the proceeds of the sale of claimant's stock was placed in the bank account of decedent would prima facie indicate the proceeds belonged to him, but the presumption was only prima facie. It was not an absolute presumption. It was a rule of evidence--a matter to be considered by the jury in the light of all the other facts which appeared in evidence.

We think, too, the offered testimony of witnesses as to statements made by claimant in regard to her ownership at the time the stock was sold and at the time the stock was still in her possession was erroneously excluded, and that this evidence should have been admitted.

Defendant also argues that since the claim was for a fixed amount of money, it did not call for the exercise of equitable rules by the Probate court and that the claimant was therefore obliged to prove a precise sum due. Nowhere, says defendant, is there any proof made of any specific amount that claimant ever turned over to the decedent. There is not, he says, a word of evidence to show how much money claimant ever loaned Dr. Macdonald, and the record is silent as to whether the loan was ten or ten thousand dollars. There were facts, he says, which might have been easily proved, and in this connection he cites Schell v. Weaver, 225 Ill. 159, where it was held





that the allowance of a claim against an estate did not require the exercise of chancery powers by the Probate court and that the rule upon review of controverted questions of fact is the same in such cases as in other actions at law.

Here, again, this rule is not controverted. This claim is not for money loaned. As already said, the suit is based upon the theory that as a matter of conscience claimant is entitled to recover from the estate the amount of money which the decedent received from the sale of stock which belonged to the claimant. That sum is definitely proved by the amount received from the sale of stock. The evidence is that one of these certificates brought \$3579.35 and the other \$3567.25. The certificate of claimant brought one or the other of these amounts, and the difference is not important.

The controlling question in the case is whether the verdict of the jury is clearly and manifestly against the weight of the evidence, as defendant contends it is. The decision of that question is close upon this record. In weighing the evidence we may not disregard the fact that two judges, one in the Probate court and the other in the Circuit court, who saw and heard the witnesses, have approved the allowance of the claim; that a jury of twelve men who also saw and heard the witnesses and whose particular duty it was to try the facts have also decided these issues of fact in claimant's favor. We are not unmindful of the duty cast upon experts to jealously guard the estates of decedents from unwarranted claims. In this case the trial judge, we think, as already stated, erred as against the claimant in excluding competent evidence offered by her which it is fair to presume strongly tended to prove her case. We might wish that the record disclosed more fully material facts as to the financial transactions between decedent and claimant. We have not overlooked the testimony of James MacDonald, which is denied by claimant, but he, as well as claimant, is interested in the case. Mr. Armiger too, seems to have taken an unusual interest in the matter which makes it difficult to give full



that the admission of a claim against an estate did not require the exercise of discretionary power by the probate court and that the will upon review of controverted questions of fact is the same in such cases as in other actions at law.

Now, again, this rule is not controverted. This claim is not for money loaned. As already said, the suit is based upon the theory that as a matter of conscience claimant is entitled to recover from the estate the amount of money which the decedent received from the sale of stock which belonged to the claimant. That sum is definitely proved by the amount received from the sale of stock. The evidence is that one of those certificates brought \$257.38 and the other \$267.38. The certificate of claimant brought one on the other of these amounts, and the difference is not important.

The controlling question in the case is whether the verdict of the jury is clearly and manifestly against the weight of the evidence, as defendant contends it is. The decision of that question is alone upon this record. In weighing the evidence we may not disregard the fact that two judges, one in the Probate court and the other in the District court, the one and heard the witnesses, have suggested the admission of the claim; that a jury of twelve men who also saw and heard the witnesses and whose particular duty it was to try the facts have also decided these issues of fact in claimant's favor. We are not entitled to say that upon these facts in favor of the claimant it is fair to presume strongly against the evidence offered by her which it is fair to presume strongly in favor of her case. It might also be said that the trial judge, as indicated from unexamined affidavits. In this case the trial judge, as already stated, acted as against the claimant in excluding testimony evidence offered by her which it is fair to presume strongly in favor of her case. It might also be said that the trial judge, as indicated from affidavits made as to the financial transactions between defendant and claimant. We have not overlooked the testimony of James Matthews, who is named as witness, but he, as well as claimant, is interested in the case. Mr. Matthews too, seems to have taken an unusual interest in the matter which makes it difficult to give full

credence to everything said by him. There is nothing to indicate that claimant was indebted to Dr. Macdonald at the time of his decease. The evidence all points in the other direction. The written evidence including the affidavit prepared by him all tend to show that Miss Walker was the owner of these 25 shares of stock, and if she was, equity and good conscience demand that the estate which received the proceeds from the sale of her stock should return to her the amount received.

The judgment is affirmed.

AFFIRMED.

McSurnly, J., concurs.

O'Connor, J., specially concurring:

I agree with the result but not with all that is said in the opinion.

reference to everything said by him. There is nothing to indicate that anything was indicated to Dr. Schoenwald at the time of his statement. The evidence all points in the same direction. The witness statements including the affidavit prepared by him all tend to show that this matter was the result of some 25 months or more, and it was not, really and truly, conscience demand that the estate which resulted was returned from the fact of not being made for him to get the money received.

The following is written:

ALBANY,

February 1, 1907.

O'Connell, J., specially empowered:

I agree with the results but not with all that is said

in the opinion.



37231

JOSEPH SANULA,  
Appellee,

v.

VILLAGE OF RICHMON PARK,  
Appellant.

APPEAL FROM SUPERIOR COURT.

COOK COUNTY.

274 I.A. 649<sup>4</sup>

MR. PRESIDING JUDGE MARCHETT  
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant village from a judgment for \$300 entered upon the finding of the court in an action on the case.

The declaration alleged that on December 2, 1950, and prior thereto, defendant failed to keep a highway within its corporate limits in a reasonably safe condition, in that it permitted deep, dangerous and open ditches to be and remain outside of the slab, shoulders and drainage ditches of the highway, rendering it unsafe; that on that date while plaintiff was riding in an automobile as a guest of one Thomas Simmons, and while he was in the exercise of ordinary care for his own safety, the automobile as a result of the negligence described was precipitated into the ditch, injuring plaintiff externally and internally, causing great pain, etc., and that plaintiff duly served notice of the time and place of the injury, etc., upon the Village of Richmond Park as required by the statute.

The village filed a plea of not guilty and a further plea that it did not own, control or possess the premises in question.

Defendant contends that the duty to maintain the street in question in safe condition at the time and place was not upon the village, because the highway was then within the exclusive juris-

1935

JOHN W. BROWN

Applicant

v.

VILLAGE OF BIRCHWOOD

Respondent

CHANDLER COUNTY

STATE OF ILLINOIS

274 I.A. 649

MR. JUSTICE THOMAS M. SWANSON  
DELIVERED THE OPINION OF THE COURT

This is an appeal by defendant Village from a judgment of the circuit court in an action on the following facts:

The defendant alleged that on November 2, 1935, and

prior thereto, defendant failed to keep a highway within its

corporate limits in a reasonably safe condition, in that it per-

mitted deep, dangerous and open ditches to be and remain outside

of the legal, municipal and drainage ditches of the highway, rendering

it unsafe; that on that date while plaintiff was riding in an automobile

as a guest of one Thomas Linwood, and while he was in the exercise of

ordinary care for his own safety, the automobile as a result of the

negligence described was precipitated into the ditch, injuring plaintiff

and resulting in plaintiff's death, and that

plaintiff's death occurred while he was in and place of the highway,

and that the Village of Birchwood was negligent in the manner

The village failed a plan of two ditches and a further plan

that it did not own, control or possess the premises in question.

Defendant contends that the duty to maintain the street

in question in safe condition at the time and place was not upon

the village, because the highway was then within the exclusive juris-

diction of the State of Illinois, because plaintiff did not prove that he was in the exercise of due care for his own safety, because he was guilty of contributory negligence and because the proof of damages is too indefinite to sustain the verdict.

There is little conflict in the evidence upon material points. Defendant village is located in the south part of Cook county and was incorporated under the Cities and Villages act. The accident in which plaintiff was injured occurred on December 2, 1930, at the intersection of Crawford avenue and Sauk Trail, within the corporate limits of the village at about seven p. m. Crawford avenue is a public highway extending through and beyond the village in a north and south direction. Sauk Trail is also a public highway extending east and west through the village. Crawford avenue had been selected by the state department of roads and bridges to become a part of the proposed right of way for state route No. 49, known as the governor's highway (see Smith-Hurd's Ill. Rev. Stats., 1933, chap. 121, p. 2536.) The route when completed was to run from Chicago to Monee and to points south through Richton Park. At Monee, state route No. 50 branched off from route 49. At this time route No. 50 had been completed from Monee north into Chicago and extended through Oak Forest and Oaklawn parallel with route No. 49 and about a mile distant from it. Pavement on route No. 49 had been laid in Crawford avenue as far north as Sauk Trail but had not been laid on the north side of that trail. On the north side of Sauk Trail, at the end of the pavement, was an open ditch. It could not be seen at night by parties traveling north by automobile on route No. 49 until they came to the end of the pavement. The testimony for defendant tended to show that the ditch in question was made by the state; that for plaintiff, that it was made by the village for use as a drain from east to the west. The ditch was



election of the State of Illinois because plaintiff did not prove that he was in the exercise of due care for his own safety because he was guilty of contributory negligence and because the proof of damages in too indefinite to sustain the verdict.

There is little conflict in the evidence upon material points. Defendant village is located in the south part of Cook County and was incorporated under the City and Village Act. The accident in which plaintiff was injured occurred on December 2, 1920, at the intersection of Chestnut Avenue and Bank Street, within the corporate limits of the village as shown upon the map of Cook County as a public highway, extending through and beyond the village in a north and south direction. Bank Street is also a public highway extending east and west through the village. Chestnut Avenue had been created by the state department of roads and bridges to become a part of the proposed right of way for state route No. 42, known as the government's highway (see Chicago-South's 111. Rev. Stat. 1905, Chap. 111, p. 2222). The route when completed was to run from Chicago to Mount and to follow south through Illinois, to Mount, Illinois route No. 42 bounded off from route 42. At this place route No. 42 had been completed from Mount south into Chicago and extended through the village and beyond parallel with route No. 42 and along a little distance from it. Plaintiff on route No. 42 had been told by defendant's agent as the north as Bank Street but had not been told of the north side of Bank Street. On the north side of Bank Street, at the end of the defendant, was an open ditch. It could not be seen at night by parties traveling north by automobile on route No. 42 until they came to the end of the defendant. The testimony for defendant tends to show that the ditch in question was made by the state for the purpose, that it was made by the village for use as a drain from road to the west. The ditch was

about three or four feet wide at the bottom and about five or six feet wide on the top, and its average depth was four or five feet. It ran east on the north side of Sauk Trail and then turned toward the north along the west side of route No. 49.

The evidence for plaintiff is to the effect that there was only one warning sign on Crawford avenue within the Village. This was a detour sign placed fifty or sixty feet south of Sauk Trail. Defendant's chief of police testified that there was a warning sign 500 feet south of Sauk Trail which was marked "Pavement ends." However, it is conceded that there was no light near this sign, and that it could not be read at night. The open ditch could not be seen by a driver from the south on Crawford avenue until he came to the end of the pavement. There was a small smudge light at the side of the road known to roadmen as a "cannon ball light." This was on the west side of route No. 49, and at the end of the pavement there was another similar light on the east side which was, however, in fact not lighted at the time of the accident. There was a barricade on route No. 49 about ten or twenty feet north of the end of the pavement. This was apparently a dangerous intersection, for in less than six months from 25 to 30 automobiles had to be pulled out of this particular ditch. The evidence shows the chief of police reported the situation to the village board but nothing was done to better it. The state took care of the lights, signs and barricades, which were down much of the time.

Plaintiff's testimony is to the effect that he was riding as a guest with a Mr. Simmons from Paxton, Illinois, to Chicago. The automobile was a Studebaker. Plaintiff sat on the front seat on the right side. Simmons was driving. It was about seven o'clock and getting dark. The headlights were on. The speed of the automobile (plaintiff says) was about 35 miles an hour. Defendant's

about three or four feet wide at the bottom and about five or six feet wide on the top, and the average depth was that of five feet. It ran west on the north side of Clark Trail and then turned south on the north side of the west side of Route No. 44.

[illegible]

...and which is covered by the same provisions as the one in the ...

...to please test yours to verify because you must be a new user

new credit card facilities called to make a "contacted" - 11077

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"However, it is considered that there was no significant change in the trend."

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It might easily not be seen by a driver from the south on Broadway

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1. The number of people who are in the same boat as you are.

"I am sorry to hear that you are now ill." "I feel much better."

no significant evidence was found concerning this in the case of the

and the fact that the Government has not been able to obtain the necessary funds to carry out its program.

to the residents. There are several small groups of people living in the area.

to check your work at the end of the interview. This was repeated.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

It is to be noted that the above information was obtained from the files of the FBI, and is not to be used for any other purpose.

It was shown that the above information was obtained from the following sources:

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sex of the birds, signs and landmarks, which were seen much to

1954

and it was on that date that he was released from the hospital.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

The automobile was a Buick sedan, 1934 model, with a black top and chrome trim. It was parked in front of the building.

on the right above; "amounts not exceeding" is not about money, it's about the amount of time.

and getting dark. The headlights were on. The speed of the auto-

... (plaintiff says) was about 35 miles on foot. Defendant's ...



evidence is to the effect that it was going nearly twice that fast. This was an issue of fact for the trial court. Plaintiff had never been over this route before. He says he saw the detour sign and warned the driver and then, when it was too late to avoid the accident, saw the ditch. Just as they went into it, the car tipped over on the north end and then turned over.

Plaintiff's head and knee were cut, and his face and neck were bruised. He had a bum knee, he says, for six months and was away from his work for six weeks on account of it. He hired a man for that length of time to help his wife run the restaurant business in which he was engaged and paid for this service \$30 a week. His doctor's bill, he says, was \$82. The finding of the court was for damages to the amount of \$300.

In view of all the facts we have related we think the questions of whether plaintiff was guilty of contributory negligence and whether he established the fact affirmatively that he was in the exercise of due care were for the court. If there had been a jury, the question would have been for the jury, and the finding of the court is entitled to the same weight here as the verdict of a jury would receive. Defendant cites McLennan v. McKeown Trans. Co., 263 Ill. App. 335, where it was held that the plaintiff who was riding with another should have complained to the driver of his negligence in driving too fast and could not recover unless she could show care in that regard. The evidence here shows that plaintiff called to the attention of the driver the fact that they were approaching a detour. He could not see the ditch until they were in it, and he was not obliged in the exercise of due care to advise the driver of something which neither of them could see.

Defendant relies very much upon its contention that the highway in question was in the exclusive jurisdiction of the State

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1. I have not yet been able to find any more of the same.

doi:10.1017/S002229240000209 Printed in the United Kingdom

Given as oral dose 10 mg/kg, twice daily with food for 14 days.

[illegible]

1977-1981: World Bank, London, UK

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1. The first group of authors (e.g., [1, 2]) considers the problem of the stability of the motion of a system of particles in the field of a central body. The results of these studies are used in the theory of the motion of celestial bodies.

$\frac{1}{\sqrt{\pi}} \int_{-\infty}^{\infty} f(x) e^{-x^2} dx = \frac{1}{\sqrt{\pi}} \int_{-\infty}^{\infty} f(x) e^{-x^2} dx$

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The following information was obtained from the records of the Bureau of Census:

1. The first group of people who are interested in the results of the study are the researchers themselves. They want to know if the study was successful in achieving its objectives and if the results are consistent with their expectations.

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also to control and to improve the quality of the data

and as far as possible for those who have not arrived at school.

could also be in that regard. The evidence here shows that

Wavelengths of the light source are indicated by the color bar.

PLEASE PRINT NAME AND ADDRESS OF THE PERSON TO WHOM THE COPY IS TO BE SENT

they were in it, and he was not killed in the process of his own

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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There is a need to maintain the quality of the data and to ensure that the data is accurate and reliable.

of Illinois and it was therefore without any duty in keeping it in repair, and it cites in this connection Smith-Hurd's Ill. Rev. Stats., 1931, chap. 121, secs. 300c and 306. Section 300c denounces any person who wilfully cuts, excavates or otherwise damages any improved state highway which is under the control of the department of public works and buildings, or for the maintenance of which the state is responsible. Section 306 provides that the department of public works and buildings "after taking over roads or streets shall erect and maintain standard guide and warning signs and distance boards of uniform design." From these provisions of the statute defendant draws the inference, to use its own words, "that there was no duty upon the village in this respect." The duty of maintaining highways is specifically imposed upon the local authorities by section 12 of the Cities and Villages act. (Smith-Hurd's Ill. Rev. Stats., 1933, chap. 121, sec. 277.)

Section 12 of the Second State Bond Issue act of 1923 (Smith-Hurd's Ill. Rev. Stats., 1923, chap. 121, sec. 281) imposed a similar duty upon the local authorities in the case of an incomplete highway. Section 7 of the System of State Highways act of 1921 (Smith-Hurd's Ill. Rev. Stats., 1933, chap. 121, sec. 297) provides in substance that no road is regarded as taken over by the state until notice in writing is filed with the village president. It has also been held in numerous cases, in substance, that the statutory duty imposed on villages to keep the streets reasonably safe was not removed nor their jurisdiction in that regard lessened by the hard roads statutes. Village of Glenace v. Hurford, 317 Ill. 203; Village of Northbrook v. Sterba, 318 Ill. 360; McKean v. County of Carroll, 324 Ill. 243; Village of Marissa v. Jones, 327 Ill. 180.

The evidence for plaintiff is to the effect that the ditch



of Illinois and is one therefore without any duty in keeping it  
in repair, and is added in this connection Smith-Hurd's Ill. Rev.  
Stats., 1931, chaps. 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

was made by the village, but whether it was or not, the uncontested evidence shows that its dangerous condition had been known to the village for such time as would constitute constructive notice and imposed the duty of removing the danger. Village of Marcelles v. Howland, 124 Ill. 547; City of Flora v. Hancey, 136 Ill. 45; Village of Palestine v. Siler, 225 Ill. 630; Lawrence v. Village of Channahon, 167 Ill. App. 560; Talley v. P. V. S. & St. L. R. Co., 231 Ill. App. 513; 44 Cor. Jur. 939.

Defendant also contends with some plausibility that the proof of damages sustained as a result of the injury is indefinite. There is, however, no conflict in the evidence in this respect, and a fair inference from it is that plaintiff was unable to work for six weeks; that he was obliged to pay out \$82 for doctor's bills and \$180 for someone to do his own work while he was disabled. We think the court had the right to assume that injuries such as plaintiff received, although he did not expressly say so, would result in discomfort and pain, for which he would be entitled to some allowance. The amount of the damages is not large, and probably upon another trial, still larger damages would be awarded. We think substantial justice has been done and for that reason the judgment is affirmed.

AFFIRMED.

McSurely and O'Connor, JJ., concur.





37412

BEATRICE FELDMAN, as a General Partner  
and as a Limited Partner of the Illinois  
State Pawnors Association, Ltd., a  
Limited Partnership,

Appellee,

vs.

ILLINOIS STATE PAWNERS ASSOCIATION,  
a Limited Partnership, and JOSEPH  
E. KORSHAK, et al.,

Defendants.

On Appeal of EMANUEL M. EDELESON et al.,  
Appellants.

INTERLOCUTORY  
APPEAL FROM  
SUPERIOR COURT  
OF COOK COUNTY.

274 I.A. 650

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

This is an appeal by Emanuel M. Edelson and certain other limited partners of the Illinois State Pawnors Association, Ltd., from an order entered pendente lite appointing receivers for the Association upon the filing of a verified bill of complaint by Beatrice Feldman. The order was entered without notice upon the day on which the bill was filed.

The merits of the issues of fact and of law involved in this controversy are considered in an opinion this day filed in cause No. 37413, in which Joseph E. Korshak, surviving general partner, and others appealed from the same order. The issues of law and of fact are substantially similar, and it is unnecessary to repeat here the reasons stated in that opinion, on account of which the order must be reversed.

REVERSED.

O'Connor and McSurely, JJ., concur.

RESTATEMENT OF THE LAW, as a General Principle, and as a Limited Principle of the Illinois State Bar Association, 1913, a Limited Partnership.

Revised.

ILLINOIS STATE BAR ASSOCIATION, a Limited Partnership, and THOMAS M. BURMAN, as its Attorney.

In Appeal of THOMAS M. BURMAN as Attorney.

274 I.A. 650

THE ILLINOIS BAR ASSOCIATION, LIMITED PARTNERSHIP, APPEALS THE DECISION OF THE COURT.

This is an appeal by petition of the Illinois State Bar Association, Limited Partnership, of the Illinois State Bar Association, Limited Partnership, from an order entered December 11, 1913, appointing petitioners for the Association upon the filing of a verified bill of particulars by petitioners. The order was entered without notice upon the day on which the bill was filed.

The notice of the filing of the bill of particulars was filed in this court and the court is requested to set aside the order entered December 11, 1913, in which the Illinois State Bar Association, Limited Partnership, was appointed counsel for the Association. The basis of law and of fact are substantially similar, and it is unnecessary to repeat here the reasons stated in that opinion, on account of which the order was so reversed.

RESPECTFULLY,

THOMAS M. BURMAN, Attorney.

37413

BEATRICE FELDMAN, etc.,  
Appellee,

vs.

ILLINOIS STATE PAWNERS ASSOCIATION,  
a Limited Partnership, JOSEPH E.  
KORSNAK et al.,

On Appeal of ILLINOIS STATE PAWNERS  
ASSOCIATION, a Limited Partnership,  
and JOSEPH E. KORSNAK,  
Appellants.

APPEAL FROM INTERDICTORY  
ORDER APPOINTING RECEIVERS  
SUPERIOR COURT OF COOK  
COUNTY.

274 I.A. 650<sup>2</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Illinois State Pawners Association, a limited partnership, and Joseph E. Korsnak, from an order entered November 27, 1933, appointing receivers for all the assets and property of the partnership. The order was entered without notice upon the verified bill of complaint of Beatrice Feldman filed on that date. The record discloses a motion by defendants to vacate the order of November 27th and that the same was denied on December 22, 1933. Defendants have assigned and argued errors in that regard. However, the order of December 22nd was not appealable, and as a matter of fact no appeal has been or could be taken from it. See Smith-Hurd's Ill. Rev. Stats., chap. 110, sec. 123. The only question therefore before this court is whether the chancellor erred in entering the order of November 27th.

It appears from the bill that the Association is a limited partnership organized in 1919 under the Uniform Limited Partnership act (see Smith-Hurd's Ill. Rev. Stats. 1936, chap. 106, par. 7, pp. 2123-27, Laws of 1917, p. 569.) The articles of partnership are attached to the bill of complaint. The purpose of the partnership is stated to be to engage in lending money and taking real or personal property as security therefor, etc. The partnership, in fact, conducts a prosperous pawn-broking business at 140 North Dearborn street in Chicago. The total partnership contribution of



24113

REASONABLE MAN, etc.  
Applied.

ILLINOIS STATE BARNING ASSOCIATION  
a limited partnership, JOURNAL E.  
ROMANAS as agent.

an agent of ILLINOIS STATE BARNING  
ASSOCIATION, a limited partnership,  
and JOURNAL E. ROMANAS,  
Associates.

IN VERIFICATION OF THE CONTENTS  
OF THE OFFICE OF THE CLERK.

This is an agent by the Illinois State Barning Association,  
a limited partnership, and JOURNAL E. ROMANAS, from an order entered  
November 27, 1933, appointing receiver for all the assets and  
property of the partnership. The order was entered without notice  
upon the verified bill of complaint of JOURNAL E. ROMANAS filed on  
that date. The record discloses a motion by defendants to vacate  
the order of November 27th and that the same was denied on Decem-  
ber 22, 1933. Defendants have assigned and argued errors in that  
respect. However, the order of November 27th was not amendable,  
and as a matter of fact no amendment has been or could be taken from  
it. Now JOURNAL E. ROMANAS, Ill. Rev. State, Chap. 110, Sec. 122. The  
only question therefore before this court is whether the amend-  
ment entered in vacating the order of November 27th.  
It appears from the bill that the association is a limited  
partnership organized in 1910 under the Uniform Limited Partnership  
act (see JOURNAL E. ROMANAS, Ill. Rev. State, Chap. 110, Sec. 122, par. 7,  
pp. 3123-27, laws of 1917, p. 687). The articles of partnership  
are attached to the bill of complaint. The purpose of the partner-  
ship is stated to be to engage in burning money and taking real or  
personal property as security for loans. The partnership, in  
fact, conducts a pressure money-burning business at 140 North  
Dearborn Street in Chicago. The total partnership contribution of

324 I.A. 650

the partners is more than \$600,000. The business has been successful and profitable, dispensing large dividends from time to time to the partners, both general and limited. It has outstanding loans of more than \$300,000 amply secured and, on the date the bill was filed, had cash on hand and in the bank amounting to \$75,000.

Up to October 21, 1933, the Association consisted of about forty limited partners and two general partners, namely, defendant Joseph E. Korahak and Barney Feldman. On that date Barney Feldman died testate leaving him surviving his widow, Beatrice, complainant, and three minor children. At the time of his death he held general partnership certificate of the aggregate value of \$40,000. His wife Beatrice and the minor children held certificates in substantial amounts. The total contributions of Barney Feldman and his family to the partnership amount to \$268,500, which is somewhat less than one-half of the total capital.

The last will and testament of Barney Feldman devised and bequeathed all his estate to complainant Beatrice and named her as executrix.

Section 20 of the Uniform Partnership act provides:

"The retirement, death or insanity of a general partner dissolves the partnership, unless the business is continued by the remaining general partners

- (a) Under a right so to do stated in the certificate, or
- (b) With the consent of all members."

Here, the articles specifically provide that death shall not dissolve the partnership. Article 9 of the partnership articles, in substance, provides that a general partner may dispose of his share of the capital either by will or by assignment in writing; that such instrument shall be of controlling effect in the event of the

The partnership is now with \$100,000. The business has been successful and profitable, accumulating large dividends from time to time to the partners, both general and limited. It has endeavored to keep at least \$200,000, more or less, secured and, on the date the bill was filed, had cash on hand and in the bank amounting to \$175,000.

Up to October 31, 1933, the partnership consisted of Edward Tracy Limited partners and two general partners, namely, Edward Tracy Limited, James E. Watson and Harry Watson. On that date, Edward Tracy Limited withdrew as partner in the firm, leaving Watson, James E. Watson and Harry Watson children. At the time of his death he held general partnership certificates of the partnership value of \$40,000. His wife Watson and the other children held certificates in substantial amounts. The total contributions of Harry Watson and his family to the partnership amount to \$200,000, which is somewhat less than one-half of the total.

The last will and testament of Harry Watson devised and bequeathed all his estate as mentioned Watson and Edward Tracy as executor.

Section 30 of the Watson Testamentary act provides: "The partnership, estate or interest of a general partner in the partnership, unless the contrary is shown by the facts, shall be deemed to be the property of the partnership."

- (a) When a right so to be stated in the certificate, or
  - (b) When the consent of all members."
- Here, the articles specifically provide that death shall not dissolve the partnership. Article 9 of the partnership articles, in substance, provides that a general partner may dispose of his share of the capital either by will or by assignment in writing; that such instrument shall be of controlling effect in the event of the



death, insanity or inability of such partner; that "the retirement, death or insanity of any general partner or limited partners shall not cause a dissolution, but the surviving general partner or partners shall have the right to continue the business with all of the property of the limited partnership, provided, however, that in such event, and within thirty (30) days after the happening of such event, the interest of such general partner so becoming deceased, disqualified or unable to act in the affairs of the limited partnership" may be put up for disposition and sale and acquired by any general or limited partner upon terms provided in a previous article; that other arrangements may be made with the consent of the limited partners represented by the attorneys in fact; that the assignee or legatee shall not become a general partner unless the whole interest has been assigned or bequeathed to one person and the general partners remaining accept such person as a general partner with the consent of the majority of the limited partners expressed by the committee of attorneys in fact.

A provision with reference to the manner in which the interest of limited partners may be sold is contained in article 7. It provides that any general or limited partner shall first have the option to acquire the same at its book value plus earnings.

The sale of a general partner's individual interest is provided for by article 8 apparently referred to in article 9. In substance, it provides that such interest may be sold but must first be offered to other general partners at the book value or other price mutually agreed upon and if not taken in ten days the vendor general partner shall give thirty days written notice of his intention to sell by posting a notice and leaving a copy with the other general partners and thereupon the general partner shall be required to accept the book value of the interest so offered from any limited partner and in default thereof may sell to any other person

death, insanity or inability of such partner; that "the retirement, death or insanity of any general partner or limited partner shall not cause a dissolution, but the surviving general partner or partners shall have the right to continue the business with all of the property of the limited partnership, provided, however, that in such event, and within thirty (30) days after the happening of such event, the interest of such general partner so becoming deceased, disqualified or unable to act in the affairs of the limited partnership" may be put up for disposition and sale and acquired by any general or limited partner upon terms provided in a previous article; that other arrangements may be made with the consent of the limited partners represented by the attorneys in fact; that the assignee or legatee shall not become a general partner unless the whole interest has been assigned or bequeathed to one person and the general partner remaining accept such person as a general partner with the consent of the majority of the limited partners expressed by the committee of attorneys in fact.

A provision with reference to the manner in which the interest of limited partners may be sold is contained in article 7. It provides that any general or limited partner shall first have the option to acquire the same at its book value plus earnings. The sale of a general partner's individual interest is provided for by article 8, previously referred to in article 9. In substance, it provides that such interest may be sold but must first be offered to other general partners at the book value or other price mutually agreed upon and if not taken in ten days the vendor general partner shall give thirty days written notice of his intention to sell by posting a notice and having a copy filed with the court. Partners and thereupon the general partner shall be required to accept the book value of the interest so offered from any limited partner and in default thereof may sell to any other person.



acceptable to a majority of the general partners. The article expressly provides:

"No certificate of membership shall be issued at any time, nor shall any person be admitted as a general or limited partner without the consent of the general managing partners, or the survivor thereof in the event of death or disability."

The bill sets up the organization of the partnership, the provisions of the statute in case of the death of a general partner, the right of a limited partner to have the partnership books kept at the place of business and to inspect the same; that the limited partnership is operating under last certificate dated July 1, 1927; that this certificate provides that contributions to the capital of the limited partnership shall not exceed a million dollars; that no salary shall be paid to a general partner unless actually employed in the conduct of the business; that a general partner has the right to dispose of his contribution by will; that the successors shall have the right to participate in conducting the business to the same effect as the deceased general partner, provided the general partner remaining accepts such person; that any person desiring to become a limited or general partner shall execute, as a condition precedent thereto, a joint and several warrant of attorney, nominating a committee of two persons and their successors as irrevocable attorneys in fact of such person; that these attorneys in fact shall be selected by the general partners from among the general or limited partners, and that these attorneys shall have full power to perform all lawful acts in behalf of the limited partners; that Barney Feldman and Joseph M. Korachek were constituted general partners and appointed the committee of attorneys in fact and so continued until the death of Barney Feldman.

The bill also sets up the interest of complainant and her minor children; avers that the partnership has heretofore been a thriving and profitable one, and states the cash to be \$75,000, the inventory value of merchandise is \$100,000, and outstanding personal



acceptable to a majority of the general partners. The article ex-  
pressly provides:

"No certificate of membership shall be issued at any time,  
nor shall any person be admitted as a partner or limited partner,  
without the consent of the majority consisting partners, or the un-  
animous consent in the event of dissolving."

The bill sets up the organization of the partnership, the  
provisions of the statute in case of the death of a general partner,  
the right of a limited partner to have the partnership books kept  
at the place of business and to inspect the same; that the limited  
partnership is continuing under said certificate until July 1, 1927;  
that this certificate provides that contributions to the capital of  
the limited partnership shall not exceed a million dollars; that no  
salary shall be paid to a general partner unless actually employed  
in the conduct of the business; that a general partner has the right  
to dispose of his contribution by will; that the successors shall

have the right to participate in conducting the business to the same  
extent as the deceased partner's estate, provided the general partner  
receiving proceeds from person; that any person desiring to become a  
limited or general partner shall execute, as a condition precedent  
thereof, a joint and several warrant of attorney, nominating a com-  
mittee of two persons and their successors as irrevocable attorneys  
in fact of each person; that these attorneys in fact shall be ap-  
pointed by the general partner from among the partners or limited

partners, and that these attorneys shall have full power to perform  
all lawful acts in behalf of the limited partners; that Henry John-  
son and Thomas A. Johnson were authorized general attorneys and ap-  
pointed the committee of attorneys in fact and so continued until  
the death of Henry Johnson.

The bill also sets up the interest of complainant and her  
other children; states that the partnership has liabilities of  
thirty and probably one, and states the cash to be \$75,000, the  
inventory value of merchandise to \$100,000, and outstanding personal

property loans aggregate \$500,000. The bill states that Joseph E. Korschak has refused and denied to complainant the right to examine the books, papers, records and accounts of the partnership, or permit her representative to make an investigation so that she might obtain information. It avers the execution of the last will and testament of Barney Feldman; that it has been filed for probate and disposes of his property as heretofore stated, and "that your oratrix did thereby become entitled to participate in the conduct of the business to the same extent and with the same powers and privileges as the said Barney Feldman enjoyed at the time of his death;" that she negotiated with Joseph E. Korschak, the sole surviving partner and surviving attorney in fact to that end; that the general partners composed of Joseph E. Korschak and complainant were charged with the duty of carrying on the business of the limited partnership; that she served notice on November 30, 1933, upon Joseph E. Korschak of the death of Feldman, of his will and its bequests, and averred that she became and was a general partner with him and that she requested in that notice that Joseph should not take any action of any kind in respect to the partnership business, except in the usual course of business, until she had had an opportunity to examine the affairs of the business and be fully advised as to her responsibilities; that on November 22nd she personally visited the office of the partnership and advised Joseph that she would on the following morning at nine o'clock appear and assume her duties as a general partner in conjunction with him; that Joseph in bad temper and quarrelsome attitude stated that he would not permit her to do so or permit her to come to the offices of the company again, and that rather than permit her to assume such duties he would dissolve and wind up the affairs of the partnership, and that he was intending to do so at any rate; that he would use force, if necessary, to expel and evict her from the premises at any time thereafter if she

...the will of the testator ...  
...the right to examine ...  
...the books, papers, records and accounts of the partnership, or get ...  
...his own representative to make an investigation as to what the right ...  
...official information. It even the execution of the last will and ...  
...testament of Henry Weidman; and it has been filed for probate and ...  
...discovery of his property as heretofore stated, and "that your ...  
...with his property become entitled to participate in the conduct of ...  
...the business to the same extent and with the same powers and privi- ...  
...leges as the said Henry Weidman enjoyed at the time of his death;" ...  
...that she negotiated with Joseph E. Hornum, the sole surviving part- ...  
...ner and surviving attorney in fact at that time; that the general ...  
...partners composed of Joseph E. Hornum and complainant were charged ...  
...with the duty of carrying on the business of the limited partner- ...  
...ship; that she served notice on November 22, 1923, upon Joseph E. ...  
...Hornum of the death of Weidman, of his will and its contents, and ...  
...stated that she became and was a general partner with him and that ...  
...she requested in that notice that Joseph should not take any action ...  
...of any kind in respect to the partnership business, except in the ...  
...usual course of business, until she had an opportunity to ex- ...  
...amine the affairs of the business and be fully advised as to her ...  
...responsibilities; that on November 22nd she personally visited the ...  
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...following morning at nine o'clock appear and assume her duties as a ...  
...general partner in conjunction with him; that Joseph in bad temper ...  
...and abusive attitude stated that he would not permit her to do ...  
...so or permit her to come to the office of the company again, and ...  
...that neither then permit her to assume such duties as would disqualify ...  
...and wind up the affairs of the partnership, and that he was intend- ...  
...ing to do so at any time; that he would use force, if necessary, to ...  
...prevent her from doing so.



should present herself there; that on November 20, 1933, she served upon the Association a notice (a copy of which was attached to the bill) stating that she had appointed an auditor as her attorney in fact and authorized him to examine the books of the company in her behalf, and demanding that he be given the privilege to do so; that this notice was served on Joseph who said that the auditor could proceed the following morning but that at that time when the auditor appeared Joseph prevented him from doing his work; that negotiations and conferences between attorneys of complainant and Joseph E. Korshak and the attorney for the partnership followed and it was agreed the auditor could begin an inspection of the books and records at two o'clock p. m. on November 21, 1933; that the auditor presented himself, and that while he was examining the books Joseph caused the books and records to be taken from him and locked in the vault and refused to permit him to proceed; that contrary to the provisions of the partnership articles Joseph had from time to time drawn large and excessive amounts for salaries without rendering employment in return; that he had appropriated to his own benefit and personal use approximately \$4,000 during the year 1933, without the consent of the other limited or general partners; that he had absented himself from his place of business, remaining in Europe for upwards of fourteen weeks, and during that time wrongfully drew large and fabulous salaries; that it was his duty under the partnership articles to render reports of the business; that during a period of fourteen years he at no time rendered to the limited partners such a report; that "several years ago" a "reserve fund" was created to protect the partnership in case of an unfavorable decision was rendered on certain matters by the Internal Revenue department; that this reserve fund now amounts to \$150,000, which was created out of the profits of the partnership and should have been declared and paid as dividends; that although the matters of the Internal

should present himself there; that on November 20, 1935, the court upon the association a notice (a copy of which was attached to the bill) stating that the court had appointed an auditor to audit the books and accounts of the company in New York and authorized him to examine the books of the company in New York, and demanding that he be given the privilege to do so; that

this notice was served on Joseph and that the auditor would proceed the following morning but that at that time when the auditor suggested Joseph prevented him from doing his work; that negotiations

and controversy between attorneys of defendant and Joseph A.

Korshak and the attorney for the partnership followed and it was

stated the auditor would begin an investigation of the books and rec-

ords at two o'clock p. m. on November 21, 1935; that the auditor

examined himself, and that while he was examining the books Joseph

caused the books and records to be taken from him and looked in the

vault and refused to permit him to proceed; that contrary to the pre-

visions of the partnership articles Joseph had him take to him

three large and massive safes for carrying papers and documents

employment in return; that he had interpreted to his own benefit

and personal use approximately 15,000 dollars during the year 1935, which

the amount of the other limited or general partners; that he had

absented himself from his place of business, remaining in Europe

for periods of fourteen weeks, and leaving the business in the hands of

large and dubious relatives; that it was his duty under the partner-

ship articles to render accounts of the business; that during a

period of fourteen years he at no time rendered to the limited part-

ners and a trustee, that "trustee" was the "trustee" and

trusted to protect the partnership in case of unfavorable decision

and rendered no account of the business to the limited partners;

that this trustee had not acted as such, and was declared

out of the profits of the partnership and should have been declared

and paid as dividends; that although the nature of the interest



Revenue department had long since been decided favorably to the Association and that there is no longer any necessity for the retention of the fund, Joseph has conceived the scheme of remaining in full control of it and refuses and declines to consent to the distribution thereof to the injury and prejudice of complainant; that although complainant has on numerous occasions asked and demanded that Joseph disclose the amount withheld from the general and limited partners in the reserve fund, he has refused and declined to give her information with reference to the same and refused to make any distribution thereof, and that he has specifically stated that he would not make any distribution to complainant or to her children out of the fund or out of any other moneys belonging to the partnership because he intended to wreak vengeance upon her and destroy her financially and make the stock and interest of her children and herself in the limited partnership worthless and of no value; that he has within the past few days stated that he intended to "bust" complainant and that he would make her crawl on her "belly" before she would get any benefit out of the partnership.

The bill further avers that said Joseph is acting in a fiduciary capacity with the property and assets of the Association and in violation of these duties has repeatedly stated his intention to operate the business as he sees fit without regard to the rights of complainant and others; that he is going to expend the money of the partnership as a general partner under the powers of attorney given to him and has the right so to do without paying any attention to the demands or rights of complainant or any other of the limited partners, or his fiduciaries, and that if complainant and her attorney should come on the premises of the Association he personally would throw them out and if he could not do it, he would have his assistants do so; also that he has expressed an intention that he has the right to appoint without consent or acquiescence of com-



Revenue Department had long since been decided favorably to the application and that there is no longer any necessity for the retention of the fund, Joseph has conceived the scheme of retaining in full control of it and refuse and decline to consent to the distribution thereof to the industry and prejudice of complaint; that although complaint has on numerous occasions asked and demanded that Joseph disclose the amount withheld from the General and limited partners in the reserve fund, he has refused and declined to give out information with reference to the same and refused to make any distribution thereof, and that he has specifically stated that he would not make any distribution to complaint or to her children out of the fund or out of any other monies belonging to the partnership because he intended to wreak vengeance upon her and destroy her financially and make the stock and interest of her children and herself in the limited partnership worthless and of no value; that he has within the past few days stated that he intended to "plant" complaint and that he would make her crawl on her "belly" before she would get any benefit out of the partnership.

The bill further avers that said Joseph is acting in a financially capacity with the property and assets of the Association and in violation of these duties has repeatedly stolen his rights to operate the business as he sees fit without regard to the rights of complainant and others; that he is going to expend the money of the partnership as a general partner under the powers of attorney given to him and has the right so to do without giving any attention to the interests of the children or complaint or any other of the limited partners, or his associates, and that if complaint and her attorney should come on the premises of the Association he personally would throw them out and if he could not do it, he would have his assistants do so; also that he has expressed an intention that he has the right to appoint without consent or acquiescence of com-

plainant, his wife, Jeanette Korschak, as a general partner; that Jeanette is wholly unfamiliar with the business, but that Joseph has stated his intention to appoint her as a general and managing partner with him, so that Joseph and Jeanette may be the sole and only general partners of the Association and in full, complete control and domination of its affairs. Complainant also expresses her belief that Joseph S. Korschak, unless restrained by the court, will carry his threats into effect; that he will then be in complete control of all the properties, assets and affairs of the Association, to her great and irreparable loss and injury.

Complainant shows that she is the sister of said Joseph; that her three minor children are his nieces and nephew; that she has implored and entreated him to desist and refrain from carrying out his intentions, but that he insists he is the sole and exclusive dictator of the affairs of the Association; and she states that unless he is restrained and enjoined he will take steps to designate and appoint his wife one of the general managing partners, and that they will take control of the Association to so mismanage or dissipate the affairs, business, reserve fund, property and effects as to render the same ineffectual or of little or no value.

Complainant, according to her bill, believes that as a general partner Joseph has been guilty of conduct prejudicial to the Association, persistently committed breaches of the partnership and other agreements and has shown such antagonism and hatred toward her and the interests of herself and of her three minor children as to render a dissolution of the Association both imperative and equitable; that it will be to the best interests of all the partners both general and limited to dissolve, wind up and liquidate the business of the partnership and to distribute its assets to the persons entitled thereto; that the books, records, personal property and effects of the partnership are in the sole and exclusive





possession and under the control of Joseph E. Korahak; that he has ample opportunity to change and alter the books and to dispose of the property; that upon a complete, true and just accounting it will be shown that Joseph is indebted to the Association for a sum (as she is informed and believes to be) of many thousands of dollars; that unless a receiver is appointed she will suffer great and irreparable loss and damage; that an injunction should be issued restraining and enjoining Joseph E. Korahak from further applying the funds and property of the Association to his own use and from changing the status of the partnership by accepting Jeanette Korahak, his wife, as a general partner, and that some competent person should be appointed receiver forthwith. She avers that substantially all the property consists of cash on hand and other property of intrinsic value, such as diamonds and jewelry, all of which is easily disposed of; that in the event notice was given, Joseph E. Korahak would take steps to transfer the property and effects of the Association, to her irreparable loss and injury. She prayed an injunction to restrain Joseph from changing the books, disposing of the assets, or encumbering or secreting the same.

Such is a summary of the bill, consisting of 56 printed pages. The question for our determination is whether the appointment of these receivers without notice was error. Complainant contends that by reason of the death of her husband the partnership theretofore existing was dissolved. She bases this contention on a construction of article 9 of the partnership articles, which we are unable to follow. The article is lengthy and involved covering many subjects, and complainant interprets the word "provided" which precedes certain paragraphs as expressing conditions with which she says it was necessary defendants should comply in order to prevent a dissolution at her husband's death. In our opinion, this construction would be contrary to the intention of the partners as

possession and under the control of Joseph E. Korman; that he has  
single opportunity to change and alter the books and to dispose of  
the property; that upon a complete, true and just accounting it will  
be shown that Joseph is indebted to the Association for a sum (as  
he is informed and believes to be) of many thousands of dollars;  
that unless a receiver is appointed the will suffer great and ir-  
reparable loss and damage; that an injunction should be issued to  
prevent the same; that Joseph E. Korman is in violation of the  
trust and property of the Association to his own use and from  
misusing the same of the partnership by receiving monies  
therein, his wife, as a general partner, and that same monies  
therein should be accounted receiver forthwith. The above facts and  
circumstances all the property consists of cash on hand and other  
property of intrinsic value, such as diamonds and jewelry, all of  
which is really disposed of; that in the event notice was given,  
Joseph E. Korman would take steps to transfer the property and  
effects of the Association to his irreparable loss and injury. The  
prayer of the Association is to restrain Joseph from changing the books,  
disposing of the same, or committing or assisting the same.  
Such is a summary of the bill, consisting of 82 printed  
pages. The question for our consideration is whether the applica-  
tion of these provisions without notice was proper. Consideration has  
been made by reason of the fact of the partnership  
relationship existing was dissolved. The intent of this provision is  
a construction of article 9 of the partnership articles, which are  
and shall be as follows. The article is in part and involved covering  
many subjects, and complaint interprets the word "provided" which  
states certain paragraphs as expressing conditions with which  
it is necessary to comply in order to prevent  
a dissolution of the partnership. In our opinion, this con-  
struction would be contrary to the intention of the partners as



expressed in the entire articles of association. The word "provided" may where such meaning harmonizes with the context have the effect of creating an exception, but, ordinarily, as was said in Bonaghy v. Robinson, 210 S. W. 658, it has no other or greater significance than the word "but" or "and." See also Bouvier's Law Dictionary of Words and Phrases and Hadil v. Morris & Co., 7 A. L. J., 539.

Moreover, parts of the bill are inconsistent with the theory that the partnership has been in fact dissolved, as is one part of the bill where it is averred that complainant served notice that she had become a general partner, which complainant in her brief says she did, "desiring to organize under the act for herself and for her brother Joseph and for all the limited partners and to prevent a dissolution." Again, the language of article 9 is not in any sense mandatory, and the construction for which complainant contends can not reasonably be based upon the words used in it. Complainant's conduct is also inconsistent with such construction. We hold that the death of Feldman did not dissolve the partnership. Indeed, the bill of complaint is quite inconsistent in this respect. As a matter of fact, complainant brings her suit and describes herself as "both a limited and general partner," which she can not be if, as she now contends, the death of her husband ipse facto dissolved the partnership. The allegations of the bill are not sufficient to show that she is a general partner, for the reason that it fails to allege that she has been accepted as such by the other partners. What her exact relationship to the partnership may be, it is not necessary for us to decide at this time. She is of course a limited partner but whether she is a general partner is not a controlling fact concerning the precise question we are called upon to decide.

With the main issues raised by the bill and answer we have nothing to do on this appeal. The only question before us concerns the propriety of the order appointing receivers pendente lite.



expressed in the entire absence of association. The word "provided" may mean and would be construed with the words "and the effect of extending an exception, but, evidently, as was said in Harvard v. Robinson, 215 U.S. 682, it has no other or greater significance than the word "but" or "and". See also Howler's Law Dictionary of Words and Phrases and Will v. Meritt & Co., 7 A. L. J., 239. Moreover, parts of the bill are inconsistent with the theory that the partnership has been in fact dissolved, as in one part of the bill where it is asserted that complainant served notice that she had become a general partner, which complainant in her brief says she did, "desiring to withdraw under the act for herself and for her brother Joseph and for all the limited partners and to prevent a dissolution." Again, the language of article 9 is not in any sense mandatory, and the construction for which complainant contends can not reasonably be based upon the words used in it. Complainant's conduct is also inconsistent with such construction. We hold that the facts of the case do not dissolve the partnership. Indeed, the bill of complaint is quite inconsistent in this respect. As a matter of fact, complainant brings her suit and describes herself as "both a limited and general partner," which she can not be if, as she now contends, the death of her husband James Laidie dissolved the partnership. The allegations of the bill are not sufficient to show that she is a general partner. For the reason that it falls to be said that she has been accepted as such by the other partners. What her exact relationship to the partnership may be, it is not necessary for us to decide at this time. And it of course a limited partner but whether she is a general partner is not a controlling fact concerning the precise question we are called upon to decide. When the said issues raised by the bill and answer to have resulted in an adverse verdict. The said question being an essential part of the case and a question of fact.

It is quite unnecessary to discuss at length the law applicable to a state of facts such as are disclosed by the bill. The business is large. Many persons are interested in it and have contributed considerable amounts of money in order to develop it. These persons associated themselves under the Uniform Partnership act, apparently with the express intention of preventing the dissolution of the Association as a result of the death, disability or insanity of any of the partners. Chief Justice Scott said in the case of First National Bank v. Gage, 79 Ill. 207:

"A receiver should be appointed in no case, unless it is made to appear there is an imperative necessity for the step, to preserve some particular property for such parties as shall be entitled to the benefit."

A court will hesitate before casting upon owners of a business the expenses of a receivership where the business is a going and prosperous one, where no rights of creditors are involved and where there is no claim that the parties in charge of the business are insolvent. Complainant insists (as she rightfully may) that we should consider no part of the record in this case showing proceedings in the court beyond the time at which the receivers were appointed. In other words, she demands judgment upon her bill. We must exclude in considering it everything stated as mere conclusions. A court can rely only upon facts properly pleaded. The bill sets up that defendants have wrongfully denied complainant's right to examine the books. For this she has a complete remedy without a receivership. It questions the propriety of the salaries drawn by the general partners at a time when (if the allegations of the bill are true) the deceased husband must have approved. It complains of the failure of defendants to perform the duty of issuing statements where it would seem if there was negligence the deceased husband must have participated in it. It questions the propriety of the establishment and maintenance of the undivided profits account, in

It is quite unnecessary to discuss at length the law relating to a state of facts such as are discussed by the bill. The business is large. Many persons are interested in it and have contributed considerable amounts of money in order to develop it. These persons associated themselves under the Uniform Partnership Act, apparently with the express intention of preventing the dissolution of the Association as a result of the death, disability or insanity of any of the partners. United Trustee would seek in the case of First National Bank v. Galt, 75 Ill. 207:

"A receiver should be appointed in no case, unless it is shown that there is an insolvency or that the property of the partnership is so situated that it is necessary to have a receiver appointed to take possession of the property."

A court will hesitate before acting upon owners of a business the expense of a receivership where the business is a going and prosperous one, where no rights of creditors are involved and where there is no claim that the parties in charge of the business are insolvent. Complaint in fact (as the bill itself says) that we should consider no part of the record in this case showing circumstances in the court beyond the time at which the receivers were appointed. In other words, the demand judgment upon the bill. We must exclude in considering it everything stated as mere conclusion. A court can rely only upon facts properly pleaded. The bill sets up that defendant have wrongfully denied complainant's right to examine the books. For this she has a complete remedy without a receivership. It questions the propriety of the salaries drawn by the several partners at a time when all the divisions of the bill are (and) the business should have been approved. It complains of the failure of defendant to return the duty of issuing statements when it could have done so and to pay the interest on the money lent and not repaid in it. It questions the propriety of the expenditures and management of the undivided profits account, in



which action also, apparently, the deceased must have participated. It avers (stating circumstances) an alleged threat of Joseph Korahak to appoint his wife Jeanette a general partner, and it may well be that this is an event which should be avoided, and if so, there is an obvious remedy without a receivership. It avers that the books and records may be altered - a thing possible but very improbable under the facts as stated in the bill. It avers the right of complainant to compel Joseph M. Korahak, or the limited partners, to appoint her a general partner - a contention, as already stated, inconsistent with the theory that Feldman's death dissolved the partnership. In short, the bill discloses an unfortunate family quarrel, in which more than one woman is much interested and in which ruin is threatened to a prosperous business - the result of years of labor and industry. Complainant has rights, which no court will be slow to protect. She may have protection by appropriate orders, but the appointment of receivers was not necessary to the preservation of her rights or any one of them. The order did not preserve the status pending the litigation but destroyed it. It did not preserve the corpus of the business but tended to its destruction.

We have examined the cases cited by both parties. None of them is at all similar to this. The appointment of receivers upon facts such as here disclosed was unprecedented and constituted an abuse of discretion. Original Vienna Bakery Co. v. Reiesler, 50 Ill. App. 406; Rusbaum v. Locke, 55 Ill. App. 242; Jackson v. Metropolitan Funeral System Assoc., 268 Ill. App. 302.

For the reasons stated the order is reversed.

REVERSED.

O'Connor and McSurely, JJ., concur.

...with other laws, especially, the fact that the law is not  
 It was stated (in the report of the committee) that it was well  
 to appoint the wife of the deceased a general partner, and it was  
 that this is an event which should be avoided, and it was  
 an event which would be avoided. It was stated that the  
 and records may be altered - a thing possible but very improbable  
 which the facts as stated in the bill. It was the right of com-  
 claimed to control through the limited partners, so  
 would not a general partner - a contribution, as already stated,  
 inconsistent with the theory that the death of the partner  
 partnership, as stated, the bill should be adopted as to the  
 partner, in which more than one person is known interested and in  
 which was threatened to a partnership business - the result of  
 years of labor and industry. Complaint has been made, which no court  
 will be able to remedy. The bill has been passed by the committee  
 action, but the appointment of trustees was not necessary to the  
 preservation of her rights or any one of them. The bill has not  
 preserve the estate pending the litigation but destroyed it. It  
 did not preserve the estate of the business but tended to the

destruction.

We have examined the cases cited by both parties. None of  
 them is at all similar to this. The appointment of receivers upon  
 facts such as have disclosed was unprecedented and constituted an  
 abuse of discretion. Official Assignee v. Receiver, 20  
 Ill. App. 2d 100; Receiver v. Assignee, 21 Ill. App. 2d 100;  
Receiver v. Assignee, 22 Ill. App. 2d 100;  
 but the law is not in question.

RECEIVED

36962

CHARLES STARCK, IRVING L. STARCK  
and MINNIE J. STARCK, complainants,  
and FRANCIS MEAD, assignee,  
Defendants in Error,

v.

SOLOH GOLD and MILTON LEVINSOHN,  
copartners, doing business as MOTOR  
CAR FINANCE COMPANY, not inc.,  
MURRAY STENPEL, CLAUDE J. SHRED  
and CHRIST OLSEN,  
Plaintiffs in Error.

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

274 I.A. 650<sup>7</sup>

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Complainants filed their bill against defendants Soloh Gold and Milton Levinsohn, doing business as Motor Car Finance Company, not incorporated, and certain of their agents, asking for an accounting and praying for the purging of the account of numerous usurious charges, the restraint of certain replevin proceedings, and the return of two certain trucks that had been pledged to the defendants by chattel mortgages to secure loans; answers were filed and the cause was referred to a master who took evidence and made his report recommending a decree in accordance with the prayer of the complainants' bill; the chancellor confirmed this report and entered a decree accordingly. By this writ of error the defendants ask for a reversal.

The master found that complainants purchased two motor trucks for approximately \$5,000 each; that Gold and Levinsohn, copartners, were doing business as the Motor Car Finance Company, in the business of lending money and taking as security chattel mortgages upon motor cars and motor trucks; that on January 31, 1929, these defendants made a loan to complainants, receiving from



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them their note for \$1,134.70, payable in monthly installments with interest at the rate of seven per cent per annum; to secure payment of the note a chattel mortgage on the two trucks was given to defendants.

The master's report then proceeds in detail to give the transactions thereafter. When a note matured or there was a balance due, new notes and chattel mortgages were executed by complainants and given to defendants. The report sets forth the accounts between the parties involving the making of these various notes and the amounts paid on account and finds that when an indebtedness matured complainants were compelled to sign a renewal note for an amount substantially larger than the amount due. The master concluded that the transactions between the complainants and these defendants were tainted by usury, and that the accounting showed that there was no money due or owing from the complainants to the defendants.

The master further found that certain of these notes were made payable to Murray Stempel, one of the defendants (acting for Gold and Levineck) who indorsed the same to the Motor Car Finance Company; that at this time no money was received by said complainants for said notes, and that this was a colorable transaction and not made in good faith. The master further found that some question having arisen with reference to this mortgage, an arrangement was made that the trucks should be sold at a chattel mortgage sale and should be purchased by Stempel, and thereafter sold to Minnie J. Starck, one of the complainants, who should execute her notes and chattel mortgage; that this arrangement was carried out and Minnie Starck, the wife of Charles Starck, complainant, executed a series of notes to the order of Stempel, secured

Their note for \$1,100.00 payable in monthly installments with interest at the rate of seven per cent per annum is shown by the note a chattel mortgage on the two trucks was given to defendant.

The master's report then proceeds in detail to give the transactions thereunder. When a note matured or there was a default the note and chattel mortgage were assigned by defendant and given to defendant. The report sets forth the account between the parties involving the making of these various notes and the amount paid on account and finds that when an individual makes a complaint it is a complaint for an amount substantially larger than the amount due. The master concludes that the transactions between the complainant and these defendants were tainted by fraud, and that the accounting shows that there was no money due or owing from the complainant to the defendant.

The master further found that certain of these notes were made payable to Henry Stempel, one of the defendants (acting for Gold and Levinson) who induced the same to the Essex Gas Finance Company; that at this time no money was received by said complainant for said notes, and that this was a colorable transaction and not made in good faith. The master further found that some question having arisen with reference to this mortgage, an arrangement was made that the same should be sold at a public mortgage sale and should be purchased by Stempel, and thereafter sold to Minnie J. Stempel, one of the complainants, who should extend her note and chattel mortgage for this arrangement was made and Minnie Stempel, the wife of Charles Stempel, complainant, executed a series of notes to the order of Stempel, secured



by chattel mortgage; that subsequently Stempel entered judgment by confession on these notes, which judgment is still in force and unsatisfied; that subsequently Stempel assigned the mortgage and notes to Claud A. Sneed, one of the defendants, who caused a writ of replevin to issue out of the Municipal court against Minnie Starck, and the trucks were taken out of the possession of the complainants upon the replevin writ. This suit was still pending in the Municipal court of Chicago. The master found that no consideration was given for these notes or the chattel mortgage; that the replevin suit should be restrained and enjoined, and that the judgment on the notes should be satisfied.

Apparently Sneed, acting as the assignee of Stempel, held a sale of the trucks under the terms of the chattel mortgage, and although complainants gave notice that they were the owners of the trucks, Sneed proceeded and sold the same to Christ Olsen, also one of the defendants. The master could properly conclude that in this transaction Stempel, Sneed and Olsen were acting as the agents or servants of Gold and Levinsohn, doing business as Motor Car Finance Company, and were conniving and confederating to evade the usury laws, and that said assignments and sale were merely a pretense for this purpose. The master also found that all the notes and chattel mortgages executed by the complainants, and which were retained by the defendants, should be delivered up and cancelled, and that the defendants should be required to surrender the motor trucks taken by them.

While the abstract notes that objections were filed to this report, it fails to show what they were. Neither does the abstract show the character of any exceptions filed. In the brief for defendants counsel have undertaken to relate at considerable length the facts and the accounts between the parties,

by United Mortgage; that subsequently Chicago entered judgment

by foreclosure on these notes, which judgment is still in force

and unsatisfied; that subsequently Chicago assigned the mortgage

and notes to Edward A. Green, one of the defendants, who caused a

writ of replevin to issue out of the Municipal Court against

Minnie Green, and the books were taken out of the possession of

the defendants upon the replevin writ. This writ was still

pending in the Municipal Court of Chicago. The master found

that no communication was given for these notes to the Chicago

Mortgage; that the replevin writ should be sustained and enjoined,

and that the judgment on the notes should be satisfied.

Apparently next, acting as the assignee of Chicago,

held a sale of the books under the terms of the United Mortgage,

and although defendants gave notice that they were the owners

of the books, they proceeded and sold the same to Charles Green,

also one of the defendants. The master found properly concluding

that in this transaction Chicago, Green and Green were acting as

the agents or servants of Gold and Levinson, doing business as

Master Gas Finance Company, and were committing and participating in

violation of the laws, and that said assignments and sales were

merely a pretense for this purpose. The master also found that

all the notes and United Mortgage executed by the defendants,

and which were retained by the defendants, should be delivered up

and cancelled, and that the defendants should be required to

reimburse the notes taken by them.

While the abstract notes that defendants were filed to

this report, it will be seen that they were neither one of

abstract nor the character of any exception filed. In the

brief for defendant's counsel have been set out 22 points of error.

These include the facts and the conclusions between the parties.



without any reference to the abstract or the record. Reference should be made to the abstract where the facts upon which counsel rely appear. Under these circumstances this court will not consider assignments of error that the finding is not sustained by the evidence. Town of Western Sound v. Loper, 185 Ill. App. 60, and we shall assume that the master's findings of fact are correct. Singer, Himick & Co. v. Steele, 196 Ill. 426; Strayer v. Dickerson, 213 Ill. 414.

The amount of the first note was \$1,124.70, with interest at seven per cent; the amount actually loaned was \$855.99. The amount of the second note was \$1,275, with interest at seven per cent; the amount actually loaned was \$1,000. These were typical of the transactions. Section 2 of the Interest act, Chap. 75, permits a maximum rate of interest of seven per cent on money loaned. Under the circumstances referred to the loans were usurious. Borrowers, etc. v. Ekland, 190 Ill. 237; Clemens v. Crane, 234 Ill. 215; Cobe v. Guyer, 237 Ill. 568; Lobdell v. Williams, 255 Ill. App. 489. Calling usurious charges commissions, etc., does not relieve the transaction from the taint of usury. Waher v. Lanfrom, 80 Ill. 613; Union National Bank v. L. W. A. & C. Ry. Co., 145 Ill. 208; Sanford v. Kane, 133 Ill. 199. The giving of new notes, the refinancing of original loans, taking new paper and balancing accounts will not wipe out usurious charges, and so long as any part of the original loan is unpaid the usury may be deducted therefrom. Hunter v. Hatch, 45 Ill. 178; Cobe v. Guyer, 237 Ill. 568; Lobdell v. Williams, 255 Ill. App. 489; 39 Cyc. 1003, para. 4 and 5.

What purports to be a transcript of certain proceedings in the Municipal court was introduced in evidence. It shows that a replevin suit was commenced in which Milton Levinsohn, doing



without any reference to the subject or the reasons. Statements should be made as the statements above the facts upon which evidence is presented. When these circumstances this court will not hesitate to find an error that the finding is not sustained by the evidence. Bank of America v. United States, 132 Ill. App. 3d 204 and 205. It is also stated that the master's findings of fact are correct. Bank of America v. United States, 132 Ill. App. 3d 204 and 205.

The amount of the first note was \$1,188.75, with interest at 6% per year; the amount of the second note was \$1,188.75, with interest at 6% per year. The amount of the third note was \$1,188.75, with interest at 6% per year. Section 2 of the interest act, Chap. 73, provides a maximum rate of interest of seven per cent on money loaned. Under the circumstances referred to the loans were made. Bank of America v. United States, 132 Ill. App. 3d 204 and 205. Bank of America v. United States, 132 Ill. App. 3d 204 and 205. Bank of America v. United States, 132 Ill. App. 3d 204 and 205.

It is also stated that the master's findings of fact are correct. Bank of America v. United States, 132 Ill. App. 3d 204 and 205. The giving of new notes, the reissuance of original notes, taking new paper and balancing accounts will not wipe out previous obligations and as long as any part of the original loan is repaid the money may be deducted therefrom. Bank of America v. United States, 132 Ill. App. 3d 204 and 205. Bank of America v. United States, 132 Ill. App. 3d 204 and 205. Bank of America v. United States, 132 Ill. App. 3d 204 and 205. Bank of America v. United States, 132 Ill. App. 3d 204 and 205.

business as Motor Car Finance Company, was plaintiff, and Irving Starck and John Dee were defendants. The court found the right of possession of the property replevied to be in the plaintiff. The transcript does not show what property was replevied. Defendants argue that this judgment is res adjudicata as to the issues in the present case.

The burden is upon the person who asserts res adjudicata in another proceeding. Smyer v. Nelson, 150 Ill. 629; Leopold v. City of Chicago, 150 Ill. 568; People v. Locklin, 273 Ill. 106. The master found that defendants had failed to establish that the parties, subject matter and cause of action were the same in the replevin suit as in the instant suit, hence there was no former adjudication proven, and, moreover, the only issue determined in the Municipal court was the right of possession at the time of the institution of that suit, which date does not appear. This does not determine the ownership of the property. The chancellor confirmed this, and, as we have said before, no objections or exceptions thereto have been abstracted.

Defendants assert that there was a sale of the mortgaged property under a power of sale contained in the chattel mortgage, with the acquiescence of the mortgagor, which bars him from subsequently procuring credit of moneys alleged to have been usuriously charged in the original transactions. To support this assertion defendants narrate at some length what are claimed to be the facts, but without any reference to the abstract or record. We are therefore unable to analyze their statement of the supposed facts. Complainants assert and the master found there never had been a bona fide sale.

The record does not support the claim of defendants that they were acting merely as brokers and may therefore charge a

... as to the ...  
... and ...  
of possession of the property ...  
The ...  
argue that this judgment is ...

The burden is upon the person who ...  
in another proceeding. Barber v. Barber, 100 Ill. 600; Beck v. ...  
Beck v. ..., 100 Ill. 600; Beck v. ..., 100 Ill. 600.  
The master found that defendant had failed to establish that the  
person, subject matter and cause of action were the same in the  
replevin suit as in the instant suit, hence there was no recovery.  
...  
the Municipal Court was the right of possession at the time of the  
invasion of that suit, which date does not appear. This does  
not determine the ownership of the property. The question was  
timed this, and, as we have said before, no objection or excep-  
tion ...

Defendant claims that there was a sale of the mortgaged  
property under a power of sale contained in the mortgage.  
with the endorsement of the mortgage, which gave him the right  
to receive the proceeds of the mortgage as they were received.  
...  
...  
...  
...  
The record does not support the claim of defendant that  
...  
...



commission for investing funds. The evidence fully establishes that the loans were made by Gold and Levinsohn. True, the mother of Gold and the wife of Levinsohn occasionally supplied these men with money but they gave these women their demand notes for such moneys, which were deposited in their own bank account.

Other points are made which we have examined, but they fail to present any convincing reason to disturb the decree.

The decree required the defendants to deliver the trucks to complainants within a short day, and in the event of their failure to do so complainants' damages were assessed at the sum of \$3,000. The common, concerted action of the defendants, unlawfully to take these trucks in an endeavor to compel the payment of usury, renders them jointly and severally liable.

Lawlor v. Loewe, 235 U. S. 522.

We are of the opinion the master's report was based upon the record, and his legal conclusions are correct. The decree was justified and it is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

...for having been... The evidence...  
...the fact that... the...  
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37127

MICKAEL HARVID,  
Appellee,

vs.

ALBERT J. MORAN, Bailiff of the  
Municipal Court of Chicago, et al.,  
Appellants.

APPEAL FROM MUNICIPAL COURT  
OF COOK COUNTY.

274 I.A. 650<sup>4</sup>

MR. JUSTICE ROSS DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants in an action of replevin in which, upon trial by the court, the right to possession of the property in question was found to be in plaintiff and his damages were assessed in the sum of one cent. Plaintiff claims to have purchased at a sale under the foreclosure of a chattel mortgage. Defendants deny that the chattel mortgage was a lien upon the property at the time of the foreclosure.

The chattel mortgage is dated Feb. 2, 1929, executed by the Sandara Publishing Company, a corporation, as mortgagor, to Dominikas Piwaronas, mortgagee, conveying an assortment of heavy printing machinery, tools, equipment, and miscellaneous furniture and fixtures; the mortgagor printed a newspaper called "Sandara," for the Lithuanian National League. The mortgage was given to secure notes aggregating \$4000, maturing in one year; at the expiration of the one year affidavits of extension for another year were executed and recorded in the Recorder's office of Cook county; this was pursuant to the statute which permits the extension of a chattel mortgage. Subsequently, at the expiration of the yearly periods, two more extension affidavits were made and filed in the Recorder's office of Cook county; this would make the last yearly extension run from Feb. 2, 1932, to Feb. 2, 1933. It was within this last extension year that the occurrence took place giving rise to this replevin suit.

The statute under which the mortgagee undertook to extend



ALBERT J. HARRIS, Plaintiff,  
vs.  
ALBERT J. HARRIS, Defendant.

ALBERT J. HARRIS, Plaintiff of the  
County of Cook, State of Illinois,  
vs.  
ALBERT J. HARRIS, Defendant.

374 I.A. 650

THE COURT OF COMMON PLEAS, COUNTY OF COOK, ILLINOIS.

This is an appeal by defendant in an action of replevin in which, upon trial by the court, the right to possession of the property in question was found to be in plaintiff and his assigns was assessed in the sum of one cent. Plaintiff claims to have performed an act under the provisions of a chattel mortgage. Defendant says that the chattel mortgage was a lien upon the property at the time of the foreclosure.

The chattel mortgage is dated Feb. 2, 1932, executed by the American Building Company, a corporation, as mortgagee, to American Building Company, mortgagor, containing an assignment of all real estate, personal property, rights, interests, and all other interests and fixtures; the mortgagee printed a newspaper called "Sundays", for the American Building Company. The mortgage was given to use as a note maturing 1936, maturing 1 a year; at the expiration of the one year mortgage of extension for another year was executed and recorded in the Recorder's office of Cook County; this was pursuant to the statute which permits the extension of a chattel mortgage. Subsequently, at the expiration of the yearly period, two more extension affidavits were made and filed in the Recorder's office of Cook County; this would make the last yearly extension run from Feb. 2, 1932, to Feb. 2, 1934. It was within this last extension year that the mortgagee took place giving rise to this replevin suit.

Two years later when the mortgage was back to extend

his lien provides that the maturity of a debt secured by a chattel mortgage shall not exceed three years from the filing of such instrument for record "unless within ninety days after the expiration of said three years, \*\* the mortgagor \*\*\* shall file for record in the office of the recorder of deeds of the county where the original mortgage is recorded, an affidavit" stating the interest the mortgagee has by virtue of the mortgage in the property mentioned and the amount remaining unpaid on the mortgage and the time when it will become due by extension or otherwise, such affidavit to be recorded by the recorder, "and thereupon the mortgage lien originally acquired shall be continued and extended until ninety days after the expiration of such period of extension of the time of payment: Provided, such extension of the time of payment shall not exceed one year from the filing of such affidavit." Chap. 95, sec. 4, Illinois Statutes (Cahill.)

Plaintiff cites Buech v. Islar, 271 Ill. App. 8, in support of his claim that the lien of his mortgage continued by reason of the various extensions. In the cited case the mortgage secured a debt, the last installment of which did not mature until more than three years thereafter, and it was contended that this rendered the mortgage void ab initio because the statute limits the maturity of the debt secured by chattel mortgage to three years. The court held against this position on the ground that under the statute the mortgagee could, at the expiration of three years, extend the mortgage for another year by making the required affidavit. In the instant case there were three yearly successive extensions. We find no decided case in this State constraining this statute, but in two cases in the Federal courts the statute was held to authorize only one extension. In Re: Tengel Co., 201 Fed. 84; Fallows v. Continental Savings Bank, 235 U. S. 340. The statute in regard to chattel mortgages is in derogation of the common law and should be





strictly construed. Porter v. Bement, 35 Ill. 479. This has been applied to extensions. Griffen v. Henry, 98 Ill. App. 331. We held that the statute contemplates only one extension, and that at the time of the following occurrences the lien of the chattel mortgage, as far as the rights of third parties were concerned, had expired.

April 19, 1932, the mortgagee, Dominickas Pivaronas, went with his lawyer to the place of business of the mortgagor, the Sandara Publishing Company, and told them that he was tired of waiting for his money and that he would foreclose the mortgage; the agent of the Publishing company asked for farther time but Pivaronas stated that he would take full control and charge of all the goods and chattels. There was evidence that Pivaronas was in possession under the mortgage during April, May, and part of June, 1932; the paper "Sandara" was still printed but <sup>apparently</sup> Pivaronas paid the wages of the employees.

June 15, 1932, the attorney who represented the defendants Guskaitis and Page, told the attorney for Pivaronas that he expected to take some action against the Publishing company on behalf of his clients, who were creditors. Pivaronas then instructed his attorney to go ahead with the foreclosure of the mortgage; his attorney prepared notices of foreclosure and posted them upon the premises; the notices were to the effect that the property would be sold on June 20th at public sale pursuant to the terms of the mortgage. Upon this date the sale was had, and Michael Farvid, the plaintiff here, made a written bid of \$4000, which was accepted; a chattel mortgage bill of sale was prepared, delivered to Farvid as vendee, and recorded; subsequently a report of the sale was delivered to the Sandara Publishing Company.

On the following day, June 21st, some deputy bailiffs of the Municipal court came to the premises and informed the manager of



the Standard Publishing company that they proposed to make a levy on the property; they were informed that the property had been sold the previous day at a foreclosure sale; the bailiffs left a card to the effect that the property was in their custody.

July 16, 1932, the plaintiff filed his affidavit for replevin, alleging that on June 21, 1932, defendant Moran, Bailiff of the Municipal court, and Gudaitis and Page, defendants, wrongfully took and detained the goods and chattels; pleas were filed and the case proceeded to trial, and the court found in favor of plaintiff.

While the lien of the chattel mortgage, as to third persons, had expired, yet, when the mortgagee, Piwarenas, took possession of the chattels before the levy of the executions, his possession was paramount. Springer v. Lipsis, 200 Ill. 251; First National Bank v. Barse Commission Co., 198 Ill. 232; Southern Surety Co. v. Peoples Bank, 332 Ill. 352; Holz v. Eacker, 290 Ill. App. 125. Even where possession is taken under an unacknowledged mortgage before possession is taken under an execution, possession under the mortgage is good. Cope v. Brentz, 190 Ill. App. 544; Doty v. O'Neill and O'Neill, 272 Ill. App. 212; Pike v. Colvin, 67 Ill. 227. A mortgagee does not by extension waive his right to take possession. Landenberger v. Rector, 59 Ill. App. 550.

Appellants seem to admit in their argument that possession of the chattels is paramount, but argue that the mortgagee must openly and visibly take physical possession of the mortgaged chattels, citing Williams v. Head, 219 Ill. App. 5; Rinck v. U. S. Rubber Co., 262 Ill. App. 357, and other cases. In the first of these cases, after notices of sale were posted the mortgagor was left in possession of the property, which consisted of implements used on the farm; the foreclosure sale was postponed indefinitely; judgment was obtained by a creditor and execution issued and the sheriff levied on the property; the mortgagee brought suit for right



the Standard Publishing Company that they proposed to make a loan on the property; they were informed that the property had been sold the previous day at a foreclosure sale; the plaintiff left a card in the office that the property was in their custody.

July 18, 1938, the plaintiff filed his affidavit for removal, alleging that on June 22, 1938, defendant Korman, plaintiff of the Municipal Court, and defendant and wife, defendant, wrongfully took and detained the goods and chattels; plans were filed and the same proceeded to trial, and the court found in favor of plaintiff.

While the lien of the chattel mortgage, as to third persons, had expired, yet, when the mortgage, Korman, took possession of the chattels before the levy of the execution, his possession was paramount. Butcher v. Smith, 202 Ill. 507; First National Bank v. First National Bank, 102 Ill. 507; First National Bank v. First National Bank, 102 Ill. 507; First National Bank v. First National Bank, 102 Ill. 507; First National Bank v. First National Bank, 102 Ill. 507.

When possession is taken under an unperfected chattel mortgage before possession is taken under an execution, possession under the mortgage is good. Butcher v. Smith, 202 Ill. 507; First National Bank v. First National Bank, 102 Ill. 507; First National Bank v. First National Bank, 102 Ill. 507; First National Bank v. First National Bank, 102 Ill. 507; First National Bank v. First National Bank, 102 Ill. 507.

Plaintiff seeks to admit in third argument that possession of the chattels is paramount, but argues that the mortgage was equally and validly taken physical possession of the mortgaged chattels. Butcher v. Smith, 202 Ill. 507; First National Bank v. First National Bank, 102 Ill. 507; First National Bank v. First National Bank, 102 Ill. 507; First National Bank v. First National Bank, 102 Ill. 507; First National Bank v. First National Bank, 102 Ill. 507.

In the first of these cases, after notice of sale was posted the mortgagee was left in possession of the property, which consisted of implements used in the farm; the mortgagee sold and purchased interest; judgment was obtained by a creditor and execution issued and the property levied on the property; the mortgagee brought suit for right

of property. It was held that as he had done nothing until after the execution levy was made, the mere posting of notices of foreclosure was insufficient to constitute a taking of possession. In the second of the cited cases the levy of the execution was made before the foreclosure sale. In the present case the levy was not made until after the foreclosure sale.

The property covered by the mortgage was a complete printing plant, made up of heavy machinery and equipment used in printing a newspaper; the mortgagee, Piwaronas, was a baker by trade and it was impracticable for him to remove the property and stop the publication of the paper; instead, he took control in April and thereafter paid the wages of the employees, and permitted the Lithuanian National League, which published the paper "Sandara," to continue to print the paper in this printing plant. In First Nat. Bank of Crockett v. Barge Live Stock Commission Co., 193

Ill. 232, the court said:

"No particular mode of taking or retaining possession is required. \* \* No removal of the property from the mortgaged premises is essential if the mortgagee has actual control of it there. (Jones on Chattel Mortgages, sec. 180.) What constitutes a change of possession depends much upon the character and situation of the property. \* \* From an examination of the authorities it clearly appears if the mortgagee \* \* have the property in his view and under his control, and by exercising control over it by virtue of his mortgage, indicates an intention of depriving the mortgagor of his apparent ownership and possession, it is sufficient to protect the property from the claim of third parties."

The court could properly find that the mortgagee was in possession of the chattels from the 15th of April, to and including the 20th of June.

The method employed to foreclose conformed to the language of the mortgage and was authorized by statute; proper notices were prepared and served upon the mortgagor; notices were also posted on the door of the premises and on three other locations in the vicinity of the property. Although some witnesses testified that they saw no notices, yet the court could properly conclude that the

of property. It was held that as he had been notified with respect to the execution levy was made, the mere posting of notices at the close of the day was insufficient to constitute a taking of possession. In the event of the cited cases the levy of the execution was made before the foreclosure sale. In the present case the levy was not made until after the foreclosure sale.

The property covered by the mortgage was a complete printing plant, made up of heavy machinery and equipment used in printing a newspaper; the mortgagee, the mortgagee, was a baker by trade and it was inadvisable for him to remove the property and stop the publication of the paper; instead, he took control in April and thereafter paid the wages of the employees, and permitted the Lithuanian National League, which published the paper "Lithuanian", to continue to print and publish in this printing plant. In 1911

Lat. Bank of Chicago v. Lithuanian Nat. League, 200

III, 210, 211, 212, 213.

"The execution made of taking or retaining possession is essential to the removal of the property from the mortgagee's control. It is essential that the mortgagee has actual control of it there. (Lithuanian Nat. League v. Lat. Bank of Chicago, 200 Ill. 210, 211, 212, 213.) From an examination of the facts of the case it is clearly evident that the mortgagee had actual control of the property at the time of the execution. The mortgagee had the property in his view and under his control, and by exercising control over it by virtue of his mortgage, he had actual control of the property. The mortgagee's possession of the property was not a mere possession, it was a possession of the property from the time of the execution."

The court would properly find that the mortgagee was in possession of the property from the 18th of April, to and including the 20th of June.

The method employed to foreclose was not in the hands of the mortgagee and was authorized by statute; proper notice was given and served upon the mortgagee; notice was also posted on the door of the premises and on three other locations in the vicinity of the property. Although some witnesses testified that they saw no notice, yet the court could properly conclude that the



notices were properly posted as required; pursuant to these notices the property was sold June 30th to Harvid, the plaintiff, who received his bill of sale bearing that date; that he paid the money for it is established by the evidence, and his name subsequently appeared as the publisher of the paper "Sandara." Although the bona fides of this sale is questioned, we find nothing which would justify a holding that it was invalid.

Defendants filed a plea alleging that at the time this action was brought in the Superior court of Cook county, an action for a Trial of Right of Property upon the same identical cause of action and for the same identical property mentioned in the declaration in this cause was brought by the plaintiff against these defendants, and was still pending in the Municipal court of Chicago. Upon the trial defendants sought to introduce the files in the Municipal court case but the court sustained an objection to them. The record shows that the case in the Municipal court had been dismissed or non-suited before the hearing in the instant case, and the ruling was proper.

We call the attention of the attorney for defendants to the rule of this court with respect to briefs.

Finding no reversible error, the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

...witnesses were properly examined and testified; but when the witness  
...the property was sold to the State of Illinois, the witness  
...and received his bill of sale bearing that date; that he paid the  
...money for it is established by the evidence, and his name  
...properly appeared on the title of the paper "Landmark." Although  
...the name of this sale is questioned, we find nothing which  
...would justify a finding that it was invalid.

Defendants filed a plea alleging that at the time this re-  
...the two parties in the subject matter of this property, we notice  
...for a trial of right of property upon the same identical issue of  
...action and for the same identical property mentioned in the deca-  
...action in this case was brought by the plaintiff against these  
...defendants, and was still pending in the Municipal Court of Chicago.  
...Upon the trial defendants sought to introduce the title in the  
...Municipal Court case but the court sustained an objection to them.  
...The record shows that the case in the Municipal Court had been dis-  
...mised or non-suited before the hearing in the instant case, and  
...the ruling was proper.

We call the attention of the jury to the fact that the  
...the plea of this case with respect to title.  
...Finding in favor of the State, the Court is advised.  
...ATTORNEY.

...State of Illinois, v. J. J. and O. C. Smith, et al., Deceased.

37203

ANNIE WALDER,  
Defendant in Error,

vs.

J. Y. RICHARDS,  
Plaintiff in Error.

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H  
ERROR TO CIRCUIT COURT  
OF COOK COUNTY.

274 I.A. 651<sup>1</sup>

MR. JUSTICE McSURNLY DELIVERED THE OPINION OF THE COURT.

Upon trial of an action to recover mesne profits following a successful action in ejectment, plaintiff had a verdict for \$2782.93, and judgment against defendant was entered for this amount. Defendant seeks a reversal.

In 1906 plaintiff purchased a 25 foot lot located at 8620 North Western avenue, Chicago, for \$400, and built a house on the rear of the lot at a cost of \$500.

In 1924 defendant erected a building for a garage on the two lots immediately south of plaintiff's property. Plaintiff, claiming that the north wall of this building encroached seven inches on her property, brought a suit in ejectment which resulted in a verdict for plaintiff for these seven inches.

December 1, 1930, which was within a year after the judgment in the ejectment proceedings, plaintiff filed a suggestion of damages, pursuant to paragraph 44, chapter 45 - Ejectment - Illinois Statutes (Cahill.) This statute provides that a successful plaintiff in an ejectment proceeding, instead of the action of trespass for mesne profits to recover damages, shall, within one year after the ejectment, make and file a suggestion of a claim for mesne profits which shall be a continuation of the ejectment proceedings.

This statute provides that such suggestion shall be substantially in the same form as a declaration in an action of assumpsit for use and occupation, and the same rules of pleading shall be observed as upon declarations in personal actions; that the de-



STATE

AMERICAN NATIONAL BANK

Defendant in Error

vs.

J. V. WILKINSON

Plaintiff in Error

OF COOK COUNTY.

CAUSE NO. 1000

274 I.A. 651

MR. JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

Upon trial of an action to recover damages arising from the following

a contract of sale in which the plaintiff had a vested interest

\$2500.00, and judgment against defendant was entered for said

amount. Defendant made a motion.

The 1906 plaintiff purchased a lot 200 feet wide and 100 feet

wide, situated in Chicago, Ill., and built a house on the

west end of the lot of a part of 1900.

In 1904 defendant erected a building for a garage on the

two lots immediately south of plaintiff's property. Plaintiff

alleges that the north wall of this building encroached seven

inches on her property, front of a wall in defendant's lot

is a variety of plaintiff for these seven inches.

December 1, 1904, when was within a year after the judgment

in the judgment mentioned, plaintiff filed a suggestion of law

and, pursuant to paragraph 14, Chapter 13 - Illinois

Statutes (Chapter 13). This statute provides that a suggestion

plaintiff in an action proceeding, instead of the action of law

may for damages be recovered, shall, within one year

after the judgment, make and file a suggestion of a claim for damages

which shall be a continuation of the judgment proceedings.

This statute provides that such suggestion shall be deemed

validly in the same form as a declaration in an action of damages

for use and recovery, and the same rules of pleading shall be

observed as upon declarations in personal actions; that the de-

defendant may plead the general issue of non-assumpsit, or may plead specially, and if the issue be found for the plaintiff the jury "shall assess his damages to the amount of the mesne profits received by the defendant since he entered into possession of the premises"; that on the trial the time when defendant entered into the possession of the premises must be proven, and the time during which defendant "enjoyed the mesne profits thereof, and the value of such profits," and that "the court shall render judgment as in actions of assumpsit for use and occupation."

As a general rule the rental value of the premises is the measure of the mesne profits. Eastern Book Co. v. Jevns, 179 Ill. 71; Murphy v. Sampson, 342 Ill. 306; Walsh & Co. v. Taylor, 143 Ill. App. 46.

Plaintiff alleged by her suggestion of damages that it was filed "according to the form of the statute in such cases made and provided," and that defendant was indebted to plaintiff in the sum of \$5000 "for the use and occupation of the tenements above in the said Declaration and Judgment mentioned by the defendant, held, used and occupied, at his request, for a long space of time," and in consideration thereof, defendant promised to pay her the said sum of money on request, but has refused to do so, to the damage of plaintiff in the amount of \$5000. Defendant filed the plea of general issue, and also a special plea asserting that he did not use and occupy the premises pursuant to any agreement, but that a dispute existed relative to the lot line, "and that not until the judgment of this court was entered in this cause was it determined that the defendant wrongfully withheld the premises in question from the plaintiff."

Defendant concedes that plaintiff is entitled to recover the reasonable rental value of the seven inches of ground occupied by him for a period of five years immediately preceding the filing of the suggestion of damages, which he says is \$43.75. This

of such value, and that "the court shall render judgment as in and according to law and the conscience."

As a General who has the honor of the presence in the  
Department of the Army, Washington, D. C.

that the witness was not called to the stand in this case and that the witness was not called to the stand in this case and that the witness was not called to the stand in this case.

of the suggestion of damage, which he says is \$48.75. This by him for a period of five years immediately preceding the filing the reasonable rental value of the seven inches of ground occupied by the building was ascertained. The amount suggested for recovery is \$48.75.

From the Plaintiff."



amount was based upon the value of \$7500 which plaintiff placed on her lot. From this defendant estimated the value of the seven inches at \$175, upon which, at the rate of five per cent for five years he estimated the rental value at \$43.75. His motion to so instruct the jury was denied.

Plaintiff argues that she is not limited to the rental value in estimating her damages but may recover extra damages as the particular circumstances of the case demand; citing Rinowman v. Keener, 63 Ill. 230, where it was held that there was no substantial difference between the action provided for by the statute and the common law action of trespass for mesne profits. Plaintiff cites cases holding that in a common law action of trespass for mesne profits, plaintiff is not confined to the mere rent of the premises but the jury may give more if they so please. Wood-tile v. Tombs, 3 Wilson's Reports (Eng.) 113; Traxel v. Bag, 2 Pa. St. 271; Trotter v. Town of Dayton, 45 Oregon, 341. To this defendant replies that such extra damages may be recovered only when specially pleaded, and that in this case plaintiff has made no claim for special damages but has limited her claim to damages for the use and occupation of the occupied piece of land.

We are of the opinion defendant's position is sound. Ordinarily, the measure of damages is the fair value of the use of the premises during the occupancy of the defendant, but plaintiff is not confined to such damages but may recover all damages which he may suffer fairly resulting from the wrong complained of, if specially pleaded. 10 Am. & Eng. Enc. Law (2nd ed.) 547. This precise point was involved in Trotter v. Town of Dayton, supra. In that case, in considering a statute much like ours, the court said:

"At common law nominal damages only were recoverable in an action of ejectment, and a plaintiff, if he recovered more, was obliged to bring an independent action in trespass to recover mesne profits. The statute combines these two actions; but there is no reason why a plaintiff may not plead and give in evidence in an action to recover

amount was based upon the value of \$7500 which plaintiff claimed on her part. This value was based upon the value of the house at \$1500, upon which, at the time of the sale, the five points in addition was added, and the value of the house at \$1500 was based upon the value of the house at \$1500.

Plaintiff argues that she is not limited to the value in estimating her damages but may recover such damages as the particular circumstances of the case demand; citing Shannon v. Shannon, 22 Ill. 230, where it was held that there was no limitation.

Plaintiff also argues that the value provided for by the statute and the common law action of trespass for damages is not limited to the value of the property, but is a measure of the loss of the property. The statute provides that the value of the property is not limited to the value of the property, but is a measure of the loss of the property.

The statute provides that the value of the property is not limited to the value of the property, but is a measure of the loss of the property. The statute provides that the value of the property is not limited to the value of the property, but is a measure of the loss of the property. The statute provides that the value of the property is not limited to the value of the property, but is a measure of the loss of the property.

When specially pleaded, and when in such cases plaintiff has made no claim for special damages but has limited her claim to damages for the use and occupation of the occupied place of land. The statute provides that the value of the property is not limited to the value of the property, but is a measure of the loss of the property.

The statute provides that the value of the property is not limited to the value of the property, but is a measure of the loss of the property. The statute provides that the value of the property is not limited to the value of the property, but is a measure of the loss of the property. The statute provides that the value of the property is not limited to the value of the property, but is a measure of the loss of the property.

The statute provides that the value of the property is not limited to the value of the property, but is a measure of the loss of the property. The statute provides that the value of the property is not limited to the value of the property, but is a measure of the loss of the property. The statute provides that the value of the property is not limited to the value of the property, but is a measure of the loss of the property.

The statute provides that the value of the property is not limited to the value of the property, but is a measure of the loss of the property. The statute provides that the value of the property is not limited to the value of the property, but is a measure of the loss of the property. The statute provides that the value of the property is not limited to the value of the property, but is a measure of the loss of the property.

real property under the statute any damages he may have suffered, fairly resulting from his having been wrongfully kept out of the possession. In this, as in all cases, compensation is the measure of damages, and if a plaintiff has been unnecessarily annoyed or harassed and his business injured by the wrongful acts of a defendant in taking and retaining possession of real property, there is no reason why, in an action to recover possession thereof, he may not plead and recover such special damages."

The court held in that case that the plaintiff had properly specially pleaded matters which entitled him to damages in excess of the mere rental value of the property.

If plaintiff had, by special pleadings, claimed damages for matters arising at the time of the original trespass, defendant could have successfully pleaded the five year statute of limitations as to such special pleas, and even if the statute had not run, defendant was entitled to notice that plaintiff would claim more than the rental value so that he might plead to the same and prepare to meet such claims upon the trial. Plaintiff by her declaration having claimed only for use and occupation, was not entitled to recover for extra damages.

The court instructed the jury that its sole function in this case was to fix the reasonable rental value of the seven acres of land. In substance, this was repeated in some eight instructions given to the jury. It is evident that the jury entirely disregarded these instructions, and whether moved by sympathy or for some other reasons, returned an excessive verdict. Even if special damages had been alleged, the evidence would not have justified the amount of the verdict.

Plaintiff's brief concedes that in the common law action of trespass for mesne profits plaintiff can recover special damages only if the same are pleaded, but asserts that the damages proven were not special damages but general damages, citing Alstead v. Burke, 25 Ill. 74. This was a suit in covenant for breach of a lease of a farm, the defendant having evicted the plaintiff; the



rent property under the statute any damages he may have suffered. It is not necessary that the plaintiff should have been injured or damaged, and it is sufficient that he has been injured or damaged in fact and that the defendant is in possession of the property. There is no reason why, in an action to recover possession of real property, the plaintiff should be required to prove special damages."

The court held in that case that the plaintiff had properly specially pleaded matters which entitled him to damages in respect of the rental value of the property.

The plaintiff had, by special pleading, alleged damages for matters arising at the time of the original trespass, but the court held that the plaintiff should have specifically pleaded the five years' period of limitation as to when special pleadings, and even if the statute had not been pleaded, the court would have been bound to notice that the plaintiff would obtain more than the rental value he was entitled to if he had not pleaded the five years' period. The court held that the plaintiff was not entitled to recover damages only for the loss of the property, but also for the loss of the rental value of the property.

The court further held that the plaintiff was not entitled to recover damages for the loss of the rental value of the property in this case. In substance, this was decided in some other instance. It is evident that the jury entirely disregarded the instructions, and whether moved by sympathy or for some other reason, returned an excessive verdict. The amount awarded was not based on the evidence, and the court was not bound to set it aside.

The plaintiff's appeal was allowed and the court set aside the verdict. The court held that the plaintiff was not entitled to recover damages for the loss of the rental value of the property in this case. The court further held that the plaintiff was not entitled to recover damages for the loss of the rental value of the property in this case.

declaration alleged no special damages but the trial court admitted evidence of the probable value of the crop which plaintiff might have raised. The Supreme court reversed the judgment for the plaintiff, the opinion saying that general damages are such as the law implies and presumes to have accrued from the wrong complained of - special damages are such as really took place and are not implied by law; and that in the latter case unless the plaintiff states the particular damage he has sustained he will not be permitted to give evidence of it.

In the instant case plaintiff gave evidence tending to show that defendant maliciously encroached on her property; that he tore down a fence she had erected, and over her protest and objections made an excavation on her property, and although advised that this was on her property he persisted in erecting the wall of his garage partially on her property; she also claims that the passageway was thereby narrowed. These are special damages which should have been specially pleaded. Her declaration makes no claim for such damages and she must be confined to her declaration.

A number of things were presented on the oral argument to the court which inclines us to believe that plaintiff has acted unreasonably in this matter. She has had a number of attorneys, one after the other, to handle her claim; at one time she demanded that defendant pay her \$10,000 a year for the use and occupancy of the seven inches of land in question; she also admitted that at one time she told the attorney for defendant that she wanted \$50,000 for her lot; it is in the record that the attorney for defendant offered to give her a policy guaranteeing her title to 25 feet of land, which would give her a lot as wide as the one she had purchased; upon oral argument counsel for defendant informed the court that he had, in addition, offered plaintiff \$20,000 to terminate this litigation. We can only say that this offer was more than fair and we cannot

Declaration alleged no special damages and the trial court admitted evidence of the probable value of the crop which plaintiff might have raised. The Supreme court reversed the judgment for the plaintiff. The opinion saying that general damages are such as the lawfulness and propriety to have recovered from the wrong complained of - material damages are such as really come from and are not implied by law; and that in the latter case unless the plaintiff states the particular damage he has sustained he will not be permitted to give evidence of it.

In the instant case, Plaintiff gave evidence as to the fact that defendant maliciously wronged him in his property; that he was a tenant and had erected, and ever has erected and expects to erect an erection on his property, and although advised that this was on his property he persisted in erecting the wall of his garage partly on his property; the also claims that the gateway was thereby narrowed. There are special damages which should have been specially alleged. But declaration makes no claim for such damages and the case be confined to his declaration.

A number of things were presented on the trial argument to the court which inclined me to believe that plaintiff had acted unreasonably in this matter. The man had a number of attorneys, one after the other, to handle his claim; at one time he demanded that defendant pay him \$10,000 a year for the use and occupancy of the seven inches of land in question; and also admitted that at one time he sold the attorney for defendant that was wanted \$20,000 for her lot; it is in the record that the attorney for defendant offered to give her a policy guaranteeing her title to 25 feet of land, which would give her a lot as wide as the one she had purchased; upon trial argument counsel for defendant informed the court that he had, in addition, offered plaintiff \$1000 in immediate cash payment, as the only way that this offer was made that he and his counsel



understand why plaintiff did not readily accept it.

Moreover, it appears that the mistake with reference to the lot line was an honest mistake. Defendant evidently left the construction of the building to his contractor and took no personal part in locating the north wall of the garage; he was in Virginia when this was done. Before the work was commenced a survey was made and the contractor started to place the wall according to the lot line shown by this survey; when the contractor was notified by plaintiff of the encroachment on her lot the work was stopped, and it is stated a new survey was made which located the lot line at the same place, and relying upon this the contractor proceeded with the work. Plaintiff seems to have established her claim as to the location of the lot line by digging up and locating some ancient stakes under the sidewalk.

We recite these things solely for the purpose of showing that in our opinion plaintiff should confer with defendant for the purpose of arriving at a settlement of their differences. This honest mistake<sup>of</sup>/the defendant should not be made the occasion for mulcting him in excessive damages. The defendant has shown a disposition to be fair. Plaintiff should be willing to meet him half way and thus save further expense to both parties.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Hatchett, P. J., and O'Connor, J., concur.

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36994

MORRIS KEMP,  
Defendant in Error,

vs.

DeLUXE MOTOR CAB COMPANY,  
a Corporation,  
Plaintiff in Error.

10 H  
APPEAL TO CIRCUIT COURT  
OF COOK COUNTY.

274 I.A. 651<sup>2</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover damages for personal injuries claimed to have been sustained by him as a result of the cab driver's negligence, while plaintiff was riding as a passenger in one of defendant's cabs. There was a jury trial and a verdict and judgment in plaintiff's favor for \$5,000 and the defendant appeals.

The record discloses that about 6:45 on the morning of May 15, 1930, plaintiff, who claims he was riding as a passenger in one of defendant's cabs, was severely injured on the Outer Drive near its intersection with 23rd street in Chicago. The evidence further shows that plaintiff was a taxicab driver and had been driving one of defendant's cabs; that about six o'clock on the morning of May 15th, 1930, having finished his night work, he turned the cab over to the owner of it near Rockwell and Division streets in the north-west section of Chicago; that after doing so, plaintiff wanted to go to the vicinity of 23rd street and Cottage Grove avenue in the southeastern section of the city, and hailed one of defendant's cabs; that the cab proceeded southward traveling in the Outer Drive, and as it approached 23rd street there was a Ford car going in the same direction; that the cab driver attempted to pass this Ford car but the cab collided with the left rear part of the Ford and then ran against a post, demolishing the cab and severely injuring plaintiff and the driver of the cab. A few minutes thereafter they were both



5  
S24 I.A. 651

Plaintiff brought suit against the defendant to recover damages for personal injuries claimed to have been sustained by him as a result of the car driver's negligence, while plaintiff was riding as a passenger in one of defendant's cars. There was a jury trial and a verdict and judgment in plaintiff's favor for \$5,000 and the defendant appealed.

The record discloses that about 8:45 on the morning of May 15, 1930, plaintiff, who claims he was riding as a passenger in one of defendant's cars, was severely injured on the Outer Drive near its intersection with 33rd street in Chicago. The evidence further shows that plaintiff was a taxicab driver and had been driving one of defendant's cars; that about six o'clock on the morning of May 15th, 1930, having finished his night work, he started the car over to the owner of 11 West Roosevelt and Division streets in the north-west section of Chicago; that after doing so, plaintiff wanted to go to the vicinity of 33rd street and Cottage Grove avenue in the southeastern section of the city, and hailed one of defendant's cabs; that the cab proceeded westward traveling in the Outer Drive, and as it approached 33rd street there was a Ford car going in the same direction; that the cab driver attempted to pass this Ford car but the cab collided with the left rear part of the Ford and then ran against a post, demolishing the cab and severely injuring plaintiff and the driver of the cab. A few minutes thereafter they were both

taken to the hospital where plaintiff remained for a considerable time.

There is no dispute as to these facts, except that defendant contends that plaintiff was being given a free ride in the cab; that he was "deadheading" and therefore defendant, under the law, would not be liable unless it maliciously injured plaintiff, of which fact there is no evidence, and the court should have directed a verdict in defendant's favor, as requested; that in any event the verdict of the jury in favor of plaintiff is against the manifest weight of the evidence.

At the request of defendant the court instructed the jury that if they found from the evidence that plaintiff was not a passenger for hire in the cab at the time in question, their verdict should be for the defendant. There was evidence to the effect that plaintiff was a passenger for hire at the time he was injured, and therefore the motion of defendant for an instructed verdict was properly denied. The question then is, Is the finding of the jury to the effect that plaintiff was such passenger against the manifest weight of the evidence? Plaintiff testified that shortly after six o'clock in the morning he hailed the cab in question and got into it as a passenger, riding in the rear seat; that he had the money in his pocket and expected to pay his fare; that he directed the driver to take him to 33rd street and Cottage Grove avenue; that he did not know the cab driver; that he (plaintiff) did not wear a chauffeur's uniform when he drove the cab during the night, but wore a chauffeur's cap which he turned over to the owner of the cab about six o'clock in the morning, as above stated.

Defendant called two witnesses, one a claim adjuster who lived in the northwest section of Chicago about fifteen miles from the place of the accident, who was notified shortly after the accident

taken to the hospital where plaintiff remained for a considerable

time.

There is no dispute as to these facts, except that defendant

contends that plaintiff was being given a free ride in the cab;

that he was "drunk" and "incapable of action," under the law,

would not be liable unless it was shown that plaintiff, or

which fact there is no evidence, and the court should have directed

a verdict in defendant's favor, as requested; that in any event the

verdict of the jury in favor of plaintiff is against the manifest

weight of the evidence.

At the request of defendant the court instructed the jury

that if they found from the evidence that plaintiff was not a person

entitled to hire in the cab at the time in question, their verdict

should be for the defendant. There was evidence to the effect that

plaintiff was a passenger for hire at the time he was injured, and

therefore the action of defendant for an instructed verdict was

prematurely made. The court then said, in the presence of the jury

to the effect that plaintiff was such passenger against the manifest

weight of the evidence. Plaintiff testified that shortly after his

arrival in the morning he called the cab in question and got into

it as a passenger, riding in the rear seat; that he had the money

in his pocket and expected to pay his fare; that he delivered the

driver to take him to 33rd street and Cottage Grove avenue; that

he did not know the cab driver; that he (plaintiff) did not want

a defendant's action when he drove the cab during the night, but

wrote a defendant's note which he handed over to the owner of the

cab about six o'clock in the morning, as above stated.

Defendant called two witnesses, one a claim adjuster who

lived in the northwest section of Chicago about fifteen miles from

the place of the accident, and was qualified to testify as to the



he testified that he took a street car and went to the scene of the accident where he arrived some 20 or 30 minutes after it had taken place; that he found the cab demolished near the post and found that the flag on the meter had not been pulled - that it was straight up - and therefore the meter did not register. The other witness testified that he saw the cab when it was taken to the garage, which was about three or four hours after the accident; that the flag on the meter was broken off; that the meter was in an upright position, which would indicate that the meter was not in use prior to the accident. The driver of the cab in question was not called as a witness. There is some evidence that the day before the trial defendant tried to locate him but was unable to do so. There is further evidence to the effect that plaintiff had earned during the night before between three and four dollars and that the fare he would be required to pay the cab driver would be about \$2.75; and it is argued that it would be unreasonable to assume that plaintiff would pay out nearly all of his night's wages when he could go to the place he desired for seven cents street car fare.

Plaintiff testified that he wished to go to 33rd street and Cottage Grove avenue at the time in question to see a man with a view to purchasing from him a taxicab and that he was informed the man could be seen in that vicinity between seven and eight o'clock in the morning; that he did not want to miss the man and therefore took the cab.

The jury saw and heard the witnesses testify; the issue was simple and easily understood; they found in favor of the plaintiff; their verdict was approved by the trial Judge, who also saw the witnesses and heard them testify. Upon a careful consideration of all the evidence in the record, we are unable to say that the finding is against the manifest weight of the evidence.

He testified that he took a street car and went to the scene of the accident where he arrived some 20 or 30 minutes after it had taken place; that he found the car demolished near the west end of the street and that the flag on the car had not been pulled - that it was straight up - and therefore the car was not registered. The other witness testified that he saw the car and saw it was taken to the lot, which was about three or four hours after the accident; that the flag on the car was broken off; that the water was in an upright position, which would indicate that the water was not in use prior to the accident. The driver of the car in question was not called as a witness. There is some evidence that the day before the fatal defendant told to locate him but was unable to do so. There is further evidence to the effect that plaintiff had earned during the night before between three and four dollars and that the car would be needed to pay the car driver would be about \$2.75; and it is stated that it would be unreasonable to assume that plaintiff would pay out nearly all of his night's wages when he could go to the place he desired for seven cents per hour. Plaintiff testified that he wished to go to 5375 street and Cottage Grove avenue at the time in question to see a man with a view to purchasing from him a taxicab and that he was informed the man could be seen in that vicinity between seven and eight o'clock in the evening; that he did not want to miss the man and therefore took the car.

The jury saw and heard the witness testify; the issue was raised and easily understood; they found in favor of the plaintiff; their verdict was approved by the trial judge, who also saw the witnesses and heard them testify. Upon a careful consideration of all the evidence in the record, we are unable to say that the finding is against the weight of the evidence.

Defendant further contends that the court erred in refusing an instruction tendered by it, by which it was sought to have the court instruct the jury that if they found from the evidence that plaintiff was riding in the cab at the invitation of the cab driver without the intention of paying any fare, or to become a passenger for hire, then the plaintiff could not recover. The argument in support of this offered instruction is, that if plaintiff was not a passenger but was riding only at the invitation of the driver, he could not recover unless he was maliciously injured, and that there was no allegation in the declaration that would warrant a verdict finding that plaintiff was maliciously injured. No authority is cited in support of this argument. The instruction was properly refused because there was no evidence that the plaintiff was riding at the invitation of the driver. Moreover, as above stated, the jury was instructed at the request of defendant that plaintiff could not recover unless the jury believed from a preponderance of the evidence that plaintiff, at the time in question, was a passenger for hire. We think the instruction given sufficiently covered the point, and that it was not error to refuse the instruction.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., concurs.

McSurely, J., dissents.



Defendant further contends that the court erred in refusing  
an instruction embodied by it, by which it was shown to have the  
court instructed the jury that it may find the evidence that  
plaintiff was riding in the cab at the invitation of the cab  
driver without the intention of paying any fare, or to become a  
passenger for hire, then the plaintiff could not recover. The  
argument in support of this alleged instruction is, that if plain-  
tiff was not a passenger but was riding only at the invitation  
of the driver, he could not recover unless he was maliciously  
injured, and that there was no allegation in the declaration that  
would warrant a verdict finding that plaintiff was maliciously  
injured. He maliciously is cited in support of this argument.  
The instruction was properly refused because there was no evidence  
that the plaintiff was riding at the invitation of the driver.  
Moreover, as above stated, the jury was instructed at the request  
of defendant that plaintiff could not recover unless the jury  
believed from a preponderance of the evidence that plaintiff, at  
the time in question, was a passenger for hire. We think the  
instruction given sufficiently covered the point, and that it  
was not error to refuse the instruction.  
The judgment of the Circuit court of Cook county is

affirmed.

FORNOST JUSTICE.

Submitted, N. D., January.

Revised, 14, January.

37112

October Term, 1903

IN RE: ESTATE OF JOHN W. CARLSON,  
DECEASED

Appeal from Circuit

MABEL C. VAN VLI SINGEN  
Appellant

Court, Cook County

v.

WALTER H. CARLSON, Executor,  
Appellee

274 I.A. 651<sup>3</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT

Mabel C. Van Vliissingen filed her amended claim in the Probate court of Cook county against the estate of her father, John W. Carlson, deceased, for \$20,443.15, \$11,784.28 of which was the proceeds of an endowment life insurance policy issued to her father in which her mother, Susie L. Carlson, was the beneficiary. The balance of the claim \$8,658.95, was for interest at 6 per cent per annum, from July 8, 1913, the day on which the money was paid by the insurance company to John W. Carlson. There was a hearing before the court, the claim was disallowed, and the claimant appealed to the Circuit court. In the Circuit court there was a trial without a jury, the claim was again disallowed, and this appeal followed.

The record discloses that July 8, 1903, the Equitable Life Assurance Society issued its policy of insurance to John W. Carlson, by which it agreed, upon satisfactory proofs of his death, to pay \$10,000 to his wife, Susie L. Carlson, if living, or if she was not then living, to the assured's executors, administrators or assigns. The policy also provided that if the assured was living July 6, 1913, the \$10,000 would be paid to him, if the policy was then in force.

April 8, 1904, the same assurance society issued another

THE UNITED STATES OF AMERICA

IN SENATE

COMMITTEE ON

EDUCATION AND THE LABORERS

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REPORT

ON THE

PROCEEDINGS OF THE

COMMISSION ON THE

TEACHING OF

THE HISTORY OF THE

UNITED STATES

IN THE

MONTH OF

JULY, 1902

AND

THE

REPORT

OF THE

COMMISSION

ON THE

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THE HISTORY OF THE

UNITED STATES



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policy for \$10,000 to John M. Carlson, payable under the same conditions as those mentioned in the first policy, except that it agreed to pay the \$10,000 to John M. Carlson December 26, 1918, if the policy was then in force.

Susie L. Carlson, the wife, died in 1910, and in July and December of 1918, the assured, John M. Carlson, received from the assurance society \$11,784.30 in satisfaction of each of the policies. The evidence further shows that John M. Carlson, from time to time invested and reinvested the money received from the two policies in real estate mortgages, some of which bore interest at 6 per cent and some at 7 per cent; that in 1912 he remarried but he and his second wife separated in November, 1930. He died April 7, 1931. March 14, 1935, John M. Carlson executed his will which was admitted to probate in the Probate court of Cook county, and the estate is being administered by his executor, Walter E. Carlson, a nephew. By the terms of the will his second wife, Ida M. Carlson, and his daughter, Mabel Carlson, now Mrs. Van Vliet, the claimant, were given the right to occupy the homestead in Chicago as long as either of them desired to do so, and after either of them ceased to occupy it as a home, it was provided that it should become a part of the residuary estate. The wife, Ida M. Carlson, was given \$50,000 to be paid to her in cash or in real estate loans at par, as she might elect, in lieu of all claims she might have against the estate, including dower and widow's award. The residue of the estate was divided equally between the deceased's two daughters, Florence Carl Lewis, and Mabel Carlson Van Vliet. Mabel occupied the home site in Chicago until sometime after she was married.

Walter E. Carlson testified that he was a nephew of the deceased and executor under the will; that he did considerable business with the deceased in his lifetime and was familiar with his



affairs; that a number of times his uncle, John M. Carlson, told him that before his first wife died she requested him to preserve the life insurance for the two daughters, which he had promised to do; that about eight years before John M. Carlson died, he again mentioned the insurance money to the witness and stated he did not know whether he would give the money at that time to the girls and that he was mentioning this matter so that the witness would be "posted on things." He further stated that the money was accumulating fast and he had an ambition to double it for the girls; that on May 8 and on October 18, 1929, John M. Carlson drew his two checks for \$10,000 each payable to the order of Mrs. Lewis, and on his check stub noted, "For half payment on life insurance policy and interest," and on the other check stub, "For bal. payment on life insurance policy and interest." These checks were received and cashed by Mrs. Lewis. He further testified that John M. Carlson did business under the name of John M. Carlson & Co., and carried his bank account in this name; that John M. Carlson said the reason he sent the checks to Mrs. Lewis was that her husband had made a request for a loan; that he would not lend him any money; that he would make a distribution of the insurance money to Florence, which he had been holding for her; that on November 20, 1930, the witness wrote a letter for his uncle at the uncle's request; that the uncle then copied the letter in his own handwriting and sent it to Howard Lewis, Mrs. Lewis' husband, who was living in New York. The letter was received by Mr. and Mrs. Lewis who afterward mislaid it, but the copy of it is in evidence. The letter refers to a misunderstanding concerning income tax on the life insurance money which was received by Carlson in 1918. That \$10,000 was for the face of the policy and the other \$10,000 which he sent to Florence was for the accumulation, over a number of years, on this sum which he had invested. The letter states: "Florence's Mother was the beneficiary of the matured



Witness; that a number of times his uncle, John M. Carlson, told him that before his first wife died she requested him to promote the life insurance for the two daughters, which he had promised to do; that about eight years before John M. Carlson died, he again mentioned the insurance money to the witness and stated he did not know whether he would give the money at that time to the girls and that he was mentioning this matter so that the witness would be "familiar on things". He further stated that the money was accounted for and he had an ambition to double it for the girls; that on May 8 and on October 12, 1930, John M. Carlson drew two checks for \$10,000 each payable to the order of Mrs. Lewis, and on his death said, "The bill payment on this insurance policy and interest," and on the other check said, "The bill payment on this insurance policy and interest." These checks were received and cashed by Mrs. Lewis. He further recalled that John M. Carlson did business under the name of John M. Carlson & Co., and carried his bank account in this name; that John M. Carlson said the reason he sent the checks to Mrs. Lewis was that her husband had made a request for a loan; that he would not lend him any money; that he would make a distribution of the insurance money to his wife, which he had been holding for her; that on November 20, 1930, the witness wrote a letter for his uncle at the uncle's request; that the uncle then copied the letter in his own handwriting and sent it to Oswald Lewis, Mrs. Lewis' husband, who was living in New York. The letter was received by Mr. and Mrs. Lewis who afterwards advised it, but the copy of it is in evidence. The letter refers to a misapprehension regarding income tax on the life insurance money which was received by Carlson & Co. That \$20,000 was the face of the policy and the other \$20,000 which he sent to his wife was for the accumulation over a number of years, on this sum which he had invested. The latter clause: "Witness's name was the beneficiary of the policy"

Endowment policy & requested that I do as above stated - I do not know whether or not this is construed as a gift, inheritance or insurance \*\*\* It does not seem to me that it (is) an inheritance but rather a sort of trust fund in the girls behalf decided upon by their mother & myself - Their mother passed away in 1910, long before the maturing of the policies, and when the policies matured I secured the money and invested it for the girls. Because of my income tax and questions regarding same, I am sure you will hear from the income tax bureau in New York, and I suggest you make your request to file an amended statement. I am sorry there has been a mixup over this."

Clara G. Carlson, a sister-in-law of deceased, testified that during the war John M. Carlson was receiving some money from life insurance and was giving some to his relatives. The witness "asked about the girls and he said, 'Well, their mother's life insurance is in trust for them.' This was after Mrs. Carlson's death." The witness also testified that Carlson said that the money which he had received from the two insurance policies was accumulating so that now there was about \$12,500 for each of the girls; that he put it in trust for them; that on another occasion he told the witness he had given Florence her share and that Habel would get hers later.

Ella G. Carlson, another sister-in-law of John M. Carlson, stated that in 1930 he told her that he had done well with "that trust fund, those insurance policies held in a trust fund, I have turned over hers to Florence and I am just looking for a good investment now to turn over Habel's."

Stella N. Coleman testified that she was acquainted with John M. Carlson and visited at his home about December, 1929; that he then showed her a letter written by his first wife Susie about the insurance policies, in which Susie stated she wanted him to

insurance policy a requirement that I do so before I can  
not know whether or not this is contained in a gift, in fact,  
insurance or insurance ... it does not seem to me that it is  
an insurance but rather a sort of trust fund in the life  
policy decided upon by their father & myself - their mother  
passed away in 1916, long before the making of the policy,  
and when the policy was made I received the money and invested  
it for the life. Because of my income tax and questions re-  
garding same, I am sure you will hear from the income tax bureau  
in New York, and I suggest you make your request to the re-  
spected statement. I am sorry there has been a misunderstanding.  
Miss G. Carlson, a sister-in-law of deceased, testified  
that during the war John W. Carlson was receiving some money from  
his insurance and was giving some to his relatives. The witness  
looked about the life and he said, "Well, their mother's life in-  
surance is in trust for them." This was after Mrs. Carlson's death.  
The witness also testified that Carlson said that the money which  
he had received from the two insurance policies was accumulating  
so that now there was about \$12,000 for each of the girls; that he  
put it in trust for them; that on another occasion he told the  
witness he had given Florence her share and that Karel would get  
hers later.  
Miss G. Carlson, another sister-in-law of John W. Carlson,  
testified that in 1916 he told her that he had done well with "that  
trust fund, those insurance policies held in a trust fund, I have  
invested over half in Florence and I am just looking for a good in-  
vestment now to turn over Karel's."

Stella W. Carlson testified that she was acquainted with  
John W. Carlson and stated as his home address, 1917, that  
he then showed her a letter written by his first wife Stella about  
the insurance policies, in which Stella stated she wanted him to



give the girls the insurance policies; that she wanted him to hold the money in trust for the girls "until they are old enough or until they need it;" that John M. Carlson said at that time that his second wife said he should not have sent the \$20,000 to Florence, and he replied that it was Florence's money and that he had Mabel's and would give it to her when he thought she needed it.

In addition to the foregoing witnesses, the claimant called L. P. Miller, an attorney who had represented John M. Carlson in a number of matters in 1930. The witness stated he was willing to testify to conversations with John M. Carlson, but did not want to be criticized for revealing professional disclosures. Thereupon the executor stated he had no objection, but counsel for the executor objected, and stated that he had no right to waive the objection; the objection was sustained. Counsel then made an offer to show what the witness would testify to, which was in substance that John M. Carlson had stated he was holding the insurance money in trust for his daughters.

Claimant's position seems to be that when John M. Carlson in July and December, 1918, received the money under the policies from the assurance society, it was received by him as a trustee for his two daughters, and this seems to be predicated on the fact that the policies, when they were issued, were made payable to Susie L. Carlson, the assured's first wife, and that she requested John M. Carlson to keep the insurance policies and the money for the two daughters, and that afterward John M. Carlson stated to several witnesses that he was holding the money received from the insurance company in trust for the daughters.

We think the contention cannot be sustained. The policies were issued in 1903 and 1904; they were payable to Susie L. Carlson, the wife, in case she survived her husband; but they also provided that if the assured, John M. Carlson, was living 15 years after the

first the wife and daughter testified that she would give the money to them for the girls "until they are old enough or until they need it." That John M. Carlson said at that time that his record will show he should not have sent the \$25,000 to Florence, and he replied that it was Florence's money and that he had asked her and would give it to her when he thought she needed it.

In addition to the foregoing witnesses, the plaintiff called L. E. Miller, an attorney who had represented John M. Carlson in a number of matters in 1936. The witness stated he was willing to testify to conversations with John M. Carlson, but did not want to be criticized for revealing professional confidences. Thereupon the examiner stated he had no objection, was counsel for the plaintiff, and stated that he had no right to waive the objection; the objection was sustained. Counsel then made an offer to show what the witness would testify to, which was in substance that John M. Carlson had stated he was holding the insurance money in trust for his daughter.

Plaintiff's position seems to be that when John M. Carlson in July and December, 1918, received the money under the policies from the insurance society, it was received by him as a trustee for his two daughters, and this money to be paid out on the last thing the policies, when they were issued, were made payable to Madeleine Carlson, the assured's first wife, and that she requested John M. Carlson to keep the insurance policies and the money for the two daughters, and that afterward John M. Carlson stated to several witnesses that he was holding the money received from the insurance policies in trust for the daughters.

We think the contention cannot be sustained. The policies were issued to Madeleine and John; they were payable to Madeleine and John, in case she survived her husband; but they also provided that if she survived, John M. Carlson, was living 15 years after the

policies were issued, the money would be paid to him. Susie L. Carlson died in 1910; she was survived by the assured husband, and the money was paid to him by the insurance company 15 years after the policies were issued, namely, in July and December, 1913. The money was his property under the express terms of the policies and he did not hold it as trustee for his daughters or in any other capacity than owner. If he desired to make a gift of the insurance money to his daughters, obviously he could have done so. But the evidence falls short of what the law requires to accomplish such a result. McCartney v. Ridgway, 160 Ill. 129; Weaver v. Weaver, 182 Ill. 287; Williams v. Chamberlain, 165 Ill. 210.

In passing on the question as to what was required to constitute a gift inter vivos, the court in the McCartney case said, (p. 155): "To constitute a valid gift inter vivos, possession and title must pass to and vest in the donee, or in a trustee for the donee. If anything remains to be done to complete the gift, what so remains to be done cannot be enforced, as it is based upon no consideration."

In the Weaver case (182 Ill. 287), the assured's widow and his mother each claimed the benefit of an insurance policy upon the life of the husband and son. About a year after the assured was married he went to the insurance company and executed an assignment of the policy to his mother and left one copy with the insurance company and took the other, with the policy, to his home. About four years later he made another assignment of the policy to his wife. One copy of the assignment was attached to the policy and delivered by him to her, the other was delivered to the insurance company after his death. The court said (p. 290): "Both assignments are admitted by all parties to have been intended by the assignor as mere gifts." It was contended by the assignor of the policy to the mother, the gift was complete and that the assured had exhausted



policy was issued, the money would be paid to him. While ...  
Carrington died in 1910; she was survived by the deceased husband, and  
the money was paid to him by the insurance company 18 years after  
the policy was issued, namely, in July and December, 1918. The  
money was his property under the express terms of the policy and  
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money to his daughter, obviously he could have done so. But the  
evidence fails short of what the law requires to accomplish such a  
result. McGeehan v. McGeehan, 100 Ill. 129; Wentworth v. Wentworth, 128  
Ill. 237; Williams v. Greenleaf, 128 Ill. 210.  
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is required to be done cannot be enforced, as it is based upon no  
consideration."  
In the Young case (128 Ill. 207), the court's view was  
the mother then claimed the benefit of an insurance policy upon the  
life of her husband and son. About a year after the husband was  
married he went to the insurance company and executed an assignment  
of the policy to his mother and left one copy with the insurance  
company and took the other with the policy, to his home. About  
two years later he made another assignment of the policy to his  
wife. One copy of the assignment was attached to the policy and  
delivered by him to her, the other was delivered to the insurance  
company after his death. The court said (p. 210): "These assignments  
are ratified by all parties to have been intended by the assignor  
as more gifts." It was contended by the assignor of the policy to  
the mother, the gift was complete and that the assured had contracted

his power of further assignment. In considering this question the court said (p. 291): "The correctness of the contention depends upon whether or not there was such a delivery of the assignment as to put the control of it and the policy out of the power of the assigner during the remainder of his life. It is conceded, as clearly it must be, that unless there was such delivery the gift to the mother was not so perfected inter vivos as to give it validity as against the second assignment." The court held that the delivery of the assignment to the mother was insufficient, and continuing said, "No controversy is made upon the proposition that an actual manual delivery was not necessary, but it is admitted \* \* \* that a good delivery may be made by acts without words, by words without acts, or by both; that a delivery may be legally made to a third person for the benefit of a grantee, or, as in this case, the assignee. The usual mode of delivery is the mutual transfer from the grantor to the grantee. But it is too well understood to call for citation of authorities, that the declarations and conduct of the grantor in relation to the instrument may be such as to become equivalent to such actual delivery, and in every such case the crucial test is the intent with which the acts or declarations were made, and that intent is to be ascertained from the conduct of the parties, particularly the grantor, and all the surrounding circumstances of the transaction." And continuing (p. 292) the court, in passing on the question of delivery of a gift or deed, said: "It is indispensable, whatever means may be adopted to accomplish its delivery, that the deed pass beyond the dominion and control of the grantor, for otherwise it can not be correctly said to come within the power and control of the grantee. Their interests are diametrically opposed. Both cannot, consistently with its objects, have control of the deed at the same time, and until the grantor parts with all control over it that of the grantee does not attach.

his power of further assignment. In considering this question the court said (p. 321): "The correctness of the contention depends upon whether or not there was such a delivery of the assignment as to put the control of it and the policy out of the power of the assignor during the remainder of his life. It is conceded, as clearly it must be, that unless there was such delivery the gift to the mother was not so perfected inter vivos as to give it validity as against the second assignment." The court held that the delivery of the assignment to the mother was insufficient, and continuing said, "The controversy is made upon the proposition that an actual manual delivery was not necessary, but it is admitted as a fact a good delivery may be made by acts without words, by words without acts, or by both; that a delivery may be legally made to a third person for the benefit of a grantee, or, as in this case, the assignee. The manual mode of delivery is the usual transfer from the grantor to the grantee. But it is too well understood in all the offices of mankind, that the assignment and transfer of the grantor in relation to the instrument may be such as to be some equivalent to such actual delivery, and in every such case the essential test is the intent with which the acts or declarations were made, and that intent is to be ascertained from the conduct of the parties, particularly the grantor, and all the surrounding circumstances of the transaction." And continuing (p. 322) the court, in passing on the question of delivery of a gift or deed, said: "It is inadvisable, whatever means may be adopted to accomplish the delivery, that the deed pass beyond the donation and control of the grantor, for otherwise it can not be correctly said to pass within the power and control of the grantor. These intentions are necessarily opposed. Both cannot, consistently with its objects, have control of the deed at the same time, and until the grantor parts with all control over it that of the grantee does not attach.



\*\*\* if the grantor retains dominion and control over it, the deed is ineffectual for any purpose as a conveyance." In that case a witness testified that on the date the assured filled out the blanks at the office of the insurance company he directed the witness to inform the assured's mother that he "had assigned his policy of life insurance in the Aetna Life Insurance company, of \$2000, to her, and he would keep the policy and assignment for her;" that the witness communicated this to the mother and she replied it was very kind of her son. The court said (p. 295): "This testimony, considered most favorably to the appellee (the mother) merely amounts to saying that he made the assignment, retained possession of it, and sent word to his mother that he had made it and that he would 'keep it for her.'" It was held this was insufficient to make a valid gift. The court continuing (p. 297) quoted from the case of Radley v. Votrain, 63 Ill. 25, as follows: "If the trust is perfectly created, so that the donor or settlor has nothing more to do and the person seeking to enforce it has need of no further conveyance, \*\*\* it will be carried into effect, although it was without consideration and the possession of the property was not changed."

In Williams v. Chamberlain, 165 Ill. 210, anora, it was held that to constitute a valid gift inter vivos "there must be a delivery of the subject of the gift or acts equivalent thereto." In that case two sisters claimed the insurance as gifts under two policies on the life of their deceased brother. The policies were payable to the assured's legal representative and were found after his death in a tin box kept by him in a vault. Attached to the policies were assignments, one to each sister. The insured and his wife were estranged. Witnesses testified to conversations they had with the assured in which he stated that he had assigned the insurance to his two sisters and informed them of that fact, and



that they understood he wished them to collect insurance money for the benefit of the assured's daughter; that they had agreed to do so. The controversy was whether the money went to the estate or to the sisters. The court held that the insurance money went to the estate of the assured and not to his sisters, and said (p. 317): "We may regard it as clearly established that it was Williams' intention that the petitioners should have this insurance, but if, from mistake of law, he failed to do those things which the law requires to carry his intention into effect, mere proof of his intention, however positive and convincing, cannot change the title to the property." The court there continuing further stated (p. 321): "Nor does the evidence show that Williams created a trust or constituted himself the trustee of the petitioners, and so held possession of the policies for them. \*\*\* From a mere imperfect gift a trust can not be deduced. (Badgley v. Votrain, 65 Ill. 22.) Suppose the policies had been endowment policies, payable during the life of Williams to himself. Would it be contended that a suit could have been maintained against him by the petitioners, upon the evidence in this record, for the policies, or the proceeds after their collection? And if not against him, then why in this case against his administratrix?

"The most that can be said, we think, is that Williams intended to make a gift of the proceeds of these policies, or perhaps the policies \*\*\* to the petitioners, and took certain steps to accomplish his purpose, but left the matter incomplete."

Of course John M. Carlson could have made a gift of the insurance money to his daughters by his declaration and act and changed relation from that of owner of the money to that of trustee for the daughters. And this would have been sufficient as held in Yoken v. Hicks, 93 Ill. App. 667. In the instant case, we think it clear that the most that can be said is that John M. Carlson intended to make a



that they understood as wished them to collect insurance money for the benefit of the deceased's daughter; that they had agreed to do so. The controversy was whether the money went to the estate or to the estate. The court held that the insurance money went to the estate of the deceased and not to his sister, and said (p. 214): "We may regard it as clearly established that it was William's intention that the petitioners should have this insurance, but it, from mistake of law, he failed to do those things which the law requires to carry this intention into effect, with result that James, then, became petition and beneficiary, without change in title to the property." The court seems to have intended to say that "Not that the evidence shows that William intended a gift of money to James, but that the intention of the petitioners, and of their successors, at the time the law was then in force, was to make a gift of the money to James." (English v. Bortman, 33 Ill. 2d.) Suppose the petition had been without petition, payable during the life of William as himself. Would it be contended that a will could have been maintained against him by the petitioners, upon the evidence in this record, for the petition, or the proceeds after their sale? And if not against him, then why is this case against his estate?

"The most that can be said, we think, is that William intended to make a gift of the proceeds of these policies, or perhaps the policies to the petitioners, and took certain steps to accomplish this purpose, but left the matter incomplete."

"Of course John M. Garsen could have made a gift of the insurance money to his daughter by his declaration and act and changed the relation from that of owner of the money to that of trustee for the daughter. And this would have been sufficient to hold in English v. Bortman, 33 Ill. 2d. 337. In the instant case, we think it clear that the most that can be said is that John M. Garsen intended to make a

gift of the proceeds of the policies to his daughters but did not do so. Neither of the girls could have maintained a suit against him at any time to recover the proceeds of the policies. From 1918, when he received the money under the policies, he had complete control over it. He invested and reinvested it in mortgages and apparently kept his money in his own banking account. There is no doubt he intended the money for his two daughters; he stated this fact on a number of occasions and he gave half of the money to his daughter Florence. But having failed to make a gift of the remaining half to his daughter Isabel, and having died without having done so, the insurance money will pass under the terms of his will.

We hold the gift was incomplete and therefore the claim was properly disallowed. The result would be the same if the court had permitted the witness, Miller, to testify because what it was proposed to show by this witness was merely cumulative. We think the witness should have been permitted to testify. Phillips v. Chase, 201 Mass. 444. In that case the court in discussing the question of privileged communications between attorney and client said (p. 449): "It has been repeatedly held that this rule of privilege should be construed strictly. Foster v. Hall, 12 Pick. 99, 98. Hutton v. Robinson, 14 Pick. 416, 422. It is for the protection and benefit of the client, so that his disclosures may not be used against him in controversies with third persons. He may waive it, and if there is a controversy after his death between his estate and those claiming adversely to it, the privilege may be waived by his executor or administrator, (Brooks v. Holden, 175 Mass. 137) or by his heirs (Fossler v. Schriber, 38 Ill. 172.)"

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Witchett, P. J., and McSurely, J., concur.

gift of the proceeds of the policy to his daughter and his son  
as co-heirs of the gift could have maintained a suit against  
him at any time to recover the proceeds of the policy. From  
1919, when he received the money under the policy, he had some-  
what control over it. He invested and reinvested it in mortgages  
and apparently kept his money in his own banking account. There is  
no doubt he loaned the money to his two daughters; he stated  
this fact on a number of occasions and he gave half of the money  
to his daughter Florence, but having failed to make a gift of the  
remaining half to his daughter Isabel, and having died without  
making any will, the proceeds would still have been the property  
of the will.

It holds the gift was incomplete and therefore the claim was  
properly dismissed. The result would be the same if the court  
had permitted the witness, Miller, to testify because what it was  
proposed to show by this witness was merely cumulative. We think  
the witness should have been permitted to testify. Williams v.  
Grant, 201 Mass. 444. In that case the court in discussing the  
question of privileged communications between attorney and client  
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privilege would be restricted slightly. Harlow v. Hall, 12 Allen  
60, 68. Wilson v. Wilson, 12 Allen 410, 422. It is for the  
protection and benefit of the client, so that his disclosures may  
not be used against him in controversy with that person. He  
may waive it, and if there is a controversy after his death between  
his estate and those claiming adversely to it, the privilege may be  
waived by his executor or administrator. (Wilson v. Wilson, 12  
Mass. 127) or by his heirs (Harlow v. Hall, 12 Allen 60, 68)."  
The holding of the Illinois court is thus clearly in accord with  
this court's holding.

Malone, J., and Roberts, J., dissent.



37121

HERBERT D. RYCROFT,  
Appellee,

v.

GRACE RYCROFT COLONELL,  
Appellant.

12 H  
APPEAL FROM SUPERIOR COURT,  
COOK COUNTY.

274 L.A. 651<sup>4</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Grace Rycroft Colonell seeks to reverse an order entered by the Superior court of Cook county June 1, 1933, which among other things, awarded the custody of the ten-year old son of the parties to the father until the further order of court.

The record discloses that August 22, 1925, Herbert D. Rycroft filed his bill for divorce against his wife, Grace S. Rycroft. She filed an answer and later a cross bill praying for a divorce from him. After the issues were made up the case was heard on the cross bill, complainant having abandoned his bill, and September 22, 1927, a decree of divorce was entered in favor of the wife in accordance with the prayer of her cross bill. The custody of their four-year old son was awarded to the mother from July 1st to December 31st of each year and to the father for the remaining six months. The decree in reference to the custody of the child was subsequently modified from time to time, sometimes by agreement of the parties. There appears to have been considerable trouble between the father and mother of the child in this respect.

April 21, 1933, the father of the child filed his petition in which he set up the divorce proceeding and the provision of the decree in reference to the custody of the



child; that he was in business in Chicago, had remarried subsequent to the divorce, that his former wife had also remarried and now resided in Baltimore; that by agreement between them the child had been part of the time with each of his parents; that on April 12, 1933, he had obtained an order from the court that his former wife deliver to him the custody of the child by April 13, 1933; that she bring the child from Baltimore to Chicago for that purpose. The petition further set up that the order was not complied with; that it was for the best interests of the child that he be delivered to the custody of his father particularly for the years in which the child was attending school; that petitioner was financially able to give the child the benefit of the best schools; that the child's mother was not a fit person to have the custody of the child because of her defiance of the order of the court entered April 12, 1933; that he had rented a summer home in Wisconsin where he intended to take his son during the summer vacation; that since the divorce the mother of the child had moved from New York to Cuba, to St. Louis and to Baltimore, where she <sup>was</sup> now living and it was not for the best interest of the child to be changing schools so frequently.

The prayer was that the payments of alimony, as provided for in the decree, should be suspended until the child was brought into the jurisdiction of the court, and that the father be given the custody of the child.

May 2, 1933, Grace Bycroft Colonell filed her answer in which she admitted the divorce; that she was willing to comply with the court order of April 12th, but that the child was unable to travel on account of illness; denied that it was for the best interest of the child that he be turned over to his father, but averred that he remain with her; denied that the child was constantly changing schools and averred that while the child was in the custody



child that he was in business in Chicago, had remained responsible  
to the divorce, that his former wife had also remained and was re-  
sided in Baltimore; that by agreement between them the child had been  
put at the time with each of his parents; that on April 12, 1928, he  
had received an order from the court that his former wife deliver to  
him the custody of the child by April 12, 1928; that she bring the  
child from Baltimore to Chicago for that purpose. The petition  
therein set up that the order was not complied with, that as was for  
the best interests of the child that he be delivered to the custody  
of his father permanently for the years in which the child was  
attending school; that petitioner was financially able to give the  
child the benefit of the best education that the child's mother was  
not a fit person to have the custody of the child because of her  
delinquency at the order of the court entered April 12, 1928; that he  
had sought a warrant from the court in Baltimore when he intended to take  
the child during the summer vacation; that since the divorce the mother  
of the child had moved from New York to Chicago, Illinois and he  
Baltimore, where she was living and it was not for the best interests  
of the child to be changing schools so frequently.

The prayer was that the payment of alimony be provided  
for in the divorce, should be suspended until the child was brought  
into the jurisdiction of the court, and that the father be given  
the custody of the child.

May 2, 1928, Great Powers' counsel filed two answers in  
which he admitted the divorce; that she was willing to comply with  
the court's order of April 12, 1928, but that the child was unable to  
travel on account of ill health; that it was for the best  
interests of the child that he be turned over to his father, but  
stated that he would not admit that the child was permanently  
dangerous to the child and stated that while the child was in the custody

of his father he was taken to California for a year.

May 31, 1933, the matter came on for hearing; both parties, their counsel and the child were present. There was considerable argument by counsel for both parties in an endeavor to explain the situation to the court. The court said that he would give the custody of the child to the father and upon objection of counsel for the mother that no witnesses had been sworn and no evidence introduced the court stated he would hear the matter in September, but refused to set the petition down for hearing and directed counsel for the father to prepare an order and to bring it in the next morning, and that the boy be turned over to the father instantler, which was done. The next morning when the order was presented there was more discussion and it was stated that the mother had gone back home to Baltimore. Her counsel objected to the draft of the order as presented to the court by counsel for the father. One of the objections was that there was a finding in the order that the court had heard the testimony of witnesses when this was not the fact. There was also objection to the finding that it was for the best interest of the child that his custody be awarded to his father, but the objection was overruled and the order entered, and this appeal followed.

Of course an order may sometimes properly be entered in such a proceeding without having witnesses sworn if the facts are admitted by counsel, but an order should never be entered which finds that the court heard the testimony of witnesses when this was contrary to the fact.

Upon a careful consideration of the record we are clearly of the opinion that the hearing was insufficient to warrant the court in entering the order appealed from. By the order the custody of the child was taken from the mother and given to the

of his father he was taken to California for a year.  
May 21, 1933, the mother came on for hearing; both  
petition, child counsel and the child were present. There was  
substantial agreement by counsel for both parties in an endeavor  
to explain the situation to the court. The court said that he  
would give the custody of the child to the father and upon  
objection of counsel for the mother that no witnesses had been  
called and no witness introduced the court stated he would hear  
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over to the father tomorrow, which was done. The next morning  
after the order was presented there was some discussion and it  
was stated that the mother had gone back home to Baltimore. Her  
counsel objected to the draft of the order as presented to the  
court by counsel for the father. One of the objections was that  
there was a finding in the order that the court had heard the  
testimony of witnesses when this was not the fact. There was  
also objection to the finding that it was for the best interest  
of the child that his custody be awarded to his father, but the  
objection was overruled and the order entered, and this appeal  
followed.  
It appears on review that although properly so stated  
in such a proceeding witness having testimony given if the facts  
are established by counsel, but an order should never be entered  
which finds that the court heard the testimony of witnesses when  
this was contrary to the fact.  
Upon a careful consideration of the record we are  
convinced of the opinion that the hearing was insufficient to warrant  
the court in entering the order appealed from. By the order the  
custody of the child was taken from the mother and given to the



father until the further order of the court. We think this was unwarranted and that there should have been a much fuller hearing on the matter. Under the circumstances the decree should not have been modified without evidence.

The order of the Superior court of Cook county is reversed and the matter remanded for further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

There will be a great deal of work to be done in this line, and it is hoped that the Government will be able to do it. The first thing to be done is to get the land cleared and the roads made. Then the houses can be built and the people can be settled. It is a great task, but it is one that must be done if the country is to be developed.

The work of the Government in this line is very important. It is the only way to get the land cleared and the roads made. It is the only way to get the houses built and the people settled. It is the only way to get the country developed.

THE GOVERNMENT

THE GOVERNMENT

The Government has a great deal of work to do in this line. It must get the land cleared and the roads made. It must get the houses built and the people settled. It must get the country developed. This is a great task, but it is one that must be done if the country is to be developed. The Government has a great deal of work to do in this line. It must get the land cleared and the roads made. It must get the houses built and the people settled. It must get the country developed. This is a great task, but it is one that must be done if the country is to be developed.

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37130

REGINALD A. WITTEY,  
Appellant,

v.

MICHAEL M. NEWMAN,  
J. R. TOTENHOFF and  
GORDON C. GILLISS, as  
members of the Fire and  
Police Commission of the  
City of Park Ridge,  
Appellees.

APPEAL FROM SUPERIOR  
COURT, COOK COUNTY.

274 I.A. 651

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

*Park Ridge*  
Reginald A. Wittey, a sergeant of police of the city of ~~Chicago~~ and civil service employee, was discharged after a hearing of charges made against him by the proper officials of Park Ridge. He filed a petition in the Superior court of Cook county, praying that a writ of certiorari be issued against the defendants, directing them to produce the record of the proceedings which resulted in his discharge. Defendants made a return to the writ and after a hearing the writ was quashed, the petition dismissed, and Wittey appeals.

Wittey, in his petition filed March 13, 1933, set up verbatim, among other things, the proceedings of the Board of Fire and Police Commissioners of Park Ridge, from which it appears that he was charged with violating certain rules of the police department of Park Ridge. The charges were specified to be: (1) that Wittey permitted certain persons to lounge, congregate and loiter in and about the office of the police department; (2) that while on duty he "typed certain letters for a certain colored man on the stationery of the Police Dept."; (3) that he



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WILLIAM A. BROWN  
J. A. BROWN  
as  
member of the  
Twelve Commission of the  
City of New York

1. *THESE* 2. *THESE* 3. *THESE*

153 .A.1 4 78

Responsible & Sifted, a segment of police of the city

of Chicago and civil service employees, was discharged after a hearing of charges made against him by the proper officials of Park Ridge. He filed a petition in the Superior Court of Cook County, praying that a writ of certiorari be issued against the defendants, directing them to produce the record of the proceedings which resulted in his discharge. Defendants made a return to the writ and after a hearing the writ was denied, the petition dismissed, and costs awarded.

WISCONSIN DEPARTMENT OF REVENUE

(1) That after certain persons in Chicago, Chicago  
Department of Park Ridge. The charges were specified as not  
that he was charged with violating certain rules of the Police  
Fire and Police Commissioners of Park Ridge, from which it appears  
verbalism, among other things, the proceedings of the Board of  
colored men on the stationery of the Police Dept." (2) That he  
(2) That while on duty he "expressed certain lessons for a certain  
and Police in and about the office of the Police Department;  
(1) That after certain persons in Chicago, Chicago  
Department of Park Ridge. The charges were specified as not  
that he was charged with violating certain rules of the Police  
Fire and Police Commissioners of Park Ridge, from which it appears  
verbalism, among other things, the proceedings of the Board of

"did give to one Howard Colburne, a certain photograph, the property of said Police Dept."; and (4) that while in charge of the police station he "permitted the said Howard Colburne to take and remove a certain photograph, the property of the said Police Dept., from and out of the said station."

Attached to the charges and specifications and as a part thereof was the record of the proceedings, from which it appears that June 15, 1932, charges were filed against Wittey and served upon him; that hearings were had from time to time from August 8, 1932, until September 12, 1932; that the Board of Commissioners on September 20, 1932, rendered their decision, which is as follows: "Upon investigation of within charges, we find that a notice stating the time when and the place where this investigation was to be held, together with a copy of the charges herein, was duly served on the said R. A. Wittey more than five days prior to this investigation, by personal service of a copy of said charges.

"The Board of Fire and Police Commissioners find from all the evidence introduced on the hearing of said charges that the said R. A. Wittey is guilty as charged therein.

"It is therefore ordered that the said R. A. Wittey be and he is hereby discharged from the Police Department of the City of Park Ridge, Illinois, as of midnight, September 20, 1932."

May 8, 1933, the respondents filed their return to the writ, in which they set up what they contend is a verbatim record of the proceedings against Wittey, which is identical with that set up by the petitioner in his petition, except that in the petition the decision of the Board of Fire and Police Commissioners finds that Wittey "is guilty as charged therein," while the proceedings set up in the respondents' return find that Wittey "is guilty of the following:" then follows verbatim the specification of the

"His first act was to remove the photograph, the property of said Police Dept., and (b) that while in charge of the Police Station he 'permitted' the said Edward Galtman to take and remove a certain photograph, the property of the said Police Dept., from and out of the said station."

Attached to the charges and specifications and on a part thereof was the record of the proceedings, from which it appears that from 12, 1933, charges were filed against Wistey and moved upon him; that hearings were had from time to time from August 1, 1933, until September 12, 1933; that the Board of Commissioners on September 22, 1933, rendered their decision, which is as follows: "Upon investigation of which charges, we find that a notice stating the time when and the place where this investigation was to be held, together with a copy of the charges herein, was duly served on the said R. A. Wistey more than five days prior to this investigation, by personal service of a copy of said charges."

"The Board of Wistey and Police Commissioners find from all the evidence introduced on the hearing of said charges that the said R. A. Wistey is guilty as charged therein."

"It is therefore ordered that the said R. A. Wistey be and he is hereby discharged from the Police Department of the City of Cook County, Illinois, as of midnight, September 22, 1933."

May 2, 1934, the respondents filed their answer to the writ, in which they set up that they contend is a violation of the proceedings against Wistey, which is identical with that set up by the petition in his petition, except that in the petition the decision of the Board of Wistey and Police Commissioners finds that Wistey "is guilty as charged therein," while the proceedings set up in the respondents' return find that Wistey "is guilty of the following: When following violation the question of the



charges made.

It is conceded by the respondents that if the true record, of the proceedings before the Board of Fire and Police Commissioners, was that set up by the petitioner in his petition, namely, that the decision of the Board was that Wittey "is guilty as charged therein" this would be insufficient and therefore the judgment of the Superior court should be reversed and a judgment entered quashing the record of the proceedings. On the other hand, it is conceded by counsel for Wittey that if the true record of the proceedings is as shown in the return of the respondents to the writ, the petitioner, Wittey, was properly discharged, and the judgment of the Superior court should be affirmed.

The record discloses that on the hearing before the court the undisputed evidence shows that the record of the proceedings of the Board of Fire and Police Commissioners of Park Ridge, on the matter in question, was identical with the record set up in Wittey's petition wherein the finding and decision of the Board was that Wittey was "guilty as charged." The undisputed evidence further shows that after the petition in the instant proceeding was filed, the record of the proceedings of the Board was prepared by the city clerk and counsel, in the words and figures as appear in the respondents' return to the writ as above mentioned. The respondents contend that this was properly done because the finding and decision entered by the Board on September 20th was merely a memorandum or minute of the proceeding made at that time and that it was entirely proper for the Board afterward to cause this minute to be properly expanded to show the true record of the proceeding.

It is true that under the law, a record may be corrected at any time so that it will conform to <sup>the</sup> real facts.

People v. Uschold, 257 Ill. App. 176; Shenick v. Bd. of

It is suggested by the respondents that in the case  
recorded at the proceedings before the Board of three and before  
Commissioners, was that set up by the petitioners in this petition,  
namely, that the decision of the Board was that "Missy" is guilty  
as charged therein. This would be inconsistent and therefore the  
judgment of the Superior Court should be reversed and a judgment  
entered granting the record of the proceedings. On the other  
hand, it is suggested by counsel for Missy that at the same record  
of the proceedings is as shown in the return of the respondents to  
the writ, the petitioners, Missy was never charged, and  
the judgment of the Superior Court should be affirmed.  
The record discloses that on the hearing before the  
court the evidence shows that the record of the pro-  
ceedings of the Board of three and before Commissioners of Cook  
County, on the matter in question, was identical with the record set  
up in Missy's petition wherein the finding and decision of the  
Board was that "Missy" was "guilty as charged." The respondents  
evidence further shows that when the petition in the instant  
proceeding was filed, the record of the proceedings of the Board  
was prepared by the city clerk and counsel, in the words and  
figures as appear in the respondents' return to the writ as  
above mentioned. The respondents contend that this was not  
done because the finding and decision entered by the Board on  
proceedings with respect to respondents was identical to the proceedings  
made on that date and that it was entirely proper for the Board  
efforts to cause this minute to be properly prepared so that  
the same would be the proceedings.

It is your duty under the law, a record may be  
the  
entered at any time so that it will contain correct facts.  
Dated at Chicago, Ill., this 17th day of January, 1901. 11, 11

Education, 326 Ill. 73; City of Chicago v. McQuar, 336 Ill. 610; People v. Sellar, 324 Ill. 403.

In the instant case, therefore, the only question for decision is, Does the record as written up by the clerk and counsel for the city correctly state the proceedings had on the hearing of the charges against Vittey by the Board of Fire and Police Commissioners? This question, of course, was subject to proof as any other fact. And in such a proceeding, on the return of the record to the court, the trial is had on the record. The law does not require a return of the evidence or a certificate of the facts outside of the record, it being contrary to the practice to form an issue of fact or to hear or consider evidence in relation to the original proceeding. Funkhouser v. Coffin, 201 Ill. 357; Carroll v. Houston, 341 Ill. 511. But where there is a contest as to what is the true record, obviously this must be determined by evidence, as any controverted question.

J. A. Tottenhoff, one of the commissioners, testified that he signed the record of the proceeding in which the finding and decision of the commissioners was that Vittey "was guilty as charged," that this decision was rendered September 24, 1932, and that document set up in the petition was the only document before the commissioners at that time. The witness further testified that after the petition in the instant case was filed, the record, as submitted in respondents' return to the writ, was written up and signed by him and the other commissioners; that after Vittey filed his petition the secretary of the Board of Commissioners was instructed to prepare a record of the proceedings and minutes of the Board; that this proceeding is dated September 23, 1932, although the particular document was not made up until long afterwards.



Commissioner of the Board of Prison Commissioners  
and the Board of Prison Commissioners

In the instant case, therefore, the only question for  
decision is, does the record as written up by the clerk and approved  
for the city correctly state the proceedings had on the hearing  
of the charges against Henry by the Board of Prison Commissioners?  
This question, of course, was subject to proof  
as any other fact. And in such a proceeding, up the record of  
the record to the court, the trial is had on the record. The law  
does not require a review of the evidence as a condition of the  
trial. The record, in being brought to the court for  
review, is taken as it is, and the court is not to  
reopen the evidence or to look for errors in the  
original proceeding. People v. Smith, 100 Cal. 111, 112.  
People v. Smith, 100 Cal. 111, 112. The court is not  
to look at the trial record, especially this case, to determine  
by evidence, as any other question.  
The testimony, and of the commission, testified  
that he signed the record of the proceeding in which the finding  
and decision of the commission was that Henry was guilty as  
charged, that this decision was rendered September 24, 1913, and  
that document set up in the petition was the only document before  
the court at that time. The witness further testified  
that after the petition in the instant case was filed, the record  
as admitted in response to the writ was written up  
and signed by him and the other commissioners that Henry was  
guilty of the crime charged, and the necessity of the Board of Commissioners was  
instructed to prepare a record of the proceedings and minutes of  
the Board, that this proceeding is dated September 24, 1913,  
although the original document was not made up until later.

Michael E. Newman, also a member of the Board, testified that he was an attorney at law; that he signed the record of the proceedings as a member of the Board bearing the charges against Wittey, as produced by the petitioner. In reference to the record as produced by the respondents, he testified that that document which was dated September 27, 1932, also bore his signature and that it was not signed on the date it bore, but after the instant proceeding was brought; that before the record produced by the respondents was made up, he was called on the telephone by the city attorney who advised that he was sending over respondents' return to the writ and that he wanted the witness to sign it; that on September 20, 1932, he prepared the record of the proceedings of the Board as produced by the petitioner; that the finding and decision were in his handwriting; that the minutes of the meeting were written up afterward by the secretary.

The court then put a question to counsel for the respondents from which it appears that after the record of September 20, as produced by the petitioner was made up and signed, Wittey was discharged and nothing further was done until several months later when the minutes of the meeting were prepared. The court continuing said: "On what record was he discharged? In the record that was in existence at the time he was discharged. That is the date of this cause of action. Six months later a corrected record was fixed up. Mr. Blim (counsel for respondents): That several months later the minutes were prepared."

Charles C. Lunk, an attorney at law who was secretary of the Board of Fire and Police Commissioners, testified that he was present on the evening of September 20th when the petitioner was discharged; that he made minutes of the meeting at a later date; that the record of the proceedings as filed by the respondents in

Michael D. Lamm, also a member of the House, testified that he was an attorney at law; that he signed the record of the proceedings as a member of the House; that he was present at the meeting, as presented by the testimony. In testimony to the record as presented by the testimony, he testified that that testimony will not stand before the House, that the House and that it was not signed on the date it was, and when the House proceeded, was brought; that before the House proceeded by the record signed was made up, he was called on the telephone by the clerk attorney the advised that he was handling the proceedings, return to the wife and that he wanted the witness to sign it; that on September 24, 1934, he prepared the record of the proceedings of the House as presented by the testimony that the signing and decision were in the handwriting; that the minutes of the meeting were signed up at the time of the meeting.

The House will not hold a decision to remove the the proceedings from which is signed and after the House of Representatives, and the House of Representatives was made up and signed, thereby was changed and nothing further was done until several months later when the minutes of the meeting were signed. The House of Representatives said: "On what record was he discharged? On the record that was in existence at the time he was discharged. That is the fact of this record of action. The minutes later a corrected record was filed up. Mr. Lamm (continued for respondents). That signed record later the minutes were prepared."

Charles D. Lamm, an attorney at law who was secretary of the House of Representatives and House Commissioner, testified that he was present at the meeting at Washington with the testimony and discharged; that he made minutes of the meeting as a later date that the record of the proceedings as filed by the respondents in



their return to the writ was prepared after the suit was brought; "I was at Mr. Blim's (respondents' counsel) office, he went over this matter with me. We went over it all. He said he would work on it and I went back. Mr. Blim: Q. Why didn't you prepare the minutes before this? \* \* \* A. There was no cause for it. We have other actions where we have had police discharged there and I never prepared any more minutes than this here and there was no request made until one evening when Mr. Wittey came in."

The foregoing is substantially all the evidence in the record, and upon a consideration of it we are of the opinion that the record of the proceedings, before the Board of Fire and Police Commissioners, is that which was introduced by the petitioner, dated September 20, 1932, and that there was no other minute made of the meeting until several months thereafter. This clearly appears from the evidence which we have above quoted, and was stated by counsel for the respondents in response to a question put to him by the court where he said the minutes of the meeting were prepared several months after the meeting. This also appears from the testimony of the witness, Lunk.

If a record of such proceedings could be corrected or expanded, as it is called, in the manner in which it was done by the respondents, then every record in a civil service case could be corrected so as to make it invulnerable to any legal attack. This cannot be done. Of course the law does not require the spreading at large of a proceeding at the time the action is taken. This may be done if proper minute or memorandum is made from which it can be determined what action was there taken.

The record of the proceedings of the Board, finding that Wittey was "guilty as charged" under the rule announced in Funkhouser v. Coffin, 301 Ill. 237, is insufficient and that being

...their return to the city was prepared after the suit was brought;  
"I was at Mr. Blinn's (respondent's) counsel's office, he went over  
this matter with me. He went over it all. He said he would work  
on it and I went back. Mr. Blinn & Mr. Blinn's son prepared  
the minutes before this? \* \* \* A. There was no action for it.  
We have other actions where we have had police discharges there  
and I never prepared any more minutes than this here and there was  
no request made until one evening when Mr. Wiley came in."  
The foregoing is substantially all the evidence in the  
record, and upon a consideration of it we are of the opinion that  
the record of the proceedings, before the Board of Fire and Police  
Commissioners, in that which was introduced by the petitioner,  
dated September 20, 1922, and that there was no other minute made  
of the meeting until several months thereafter. This clearly  
appears from the evidence which we have above noted, and was  
stated by counsel for the respondents in response to a question  
put to him by the court where he said the minutes of the meeting  
were prepared several months after the meeting. This also  
appears from the testimony of the witness, Lusk.  
It is a record of such proceedings could be corrected or  
amended, as it is called, in the manner in which it was done by  
the respondents, then every record in a civil service case could  
be corrected so as to make it invulnerable to any legal attack.  
This cannot be done. Of course the law does not require the  
preparation of a record of a proceeding at the time the action is  
taken. This may be done if proper minute or memorandum is made  
from which it can be determined what action was there taken.  
The record of the proceedings of the Board, finding  
that "it is a public duty" under the rule announced in  
In re ...

the only record properly before us, the judgment of the superior court of Cook county will be reversed and the cause remanded with directions to quash the record of the proceedings had before the Fire and Police Commissioners.

REVERSED AND REMANDED WITH DIRECTIONS.

Hatchett, P. J., and McSurely, J., concur.





37166

JAMES FOUTS,  
Appellant,

vs.

ANNA MARCELLUS,  
Appellee.

14  
APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

7  
274 I.A. 652<sup>1</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal James Fouts seeks to reverse an order entered by the Circuit court of Cook county May 26, 1933, vacating an order entered May 8, 1933, by which defendant's appeal from a judgment entered by a justice of the peace was dismissed for want of prosecution.

September 27, 1928, James Fouts brought suit before a justice of the peace against Anna Marcellus and John Sullivan to recover \$293 which he claimed for damages to his automobile. There was a jury trial and a verdict and judgment in plaintiff's favor against the defendants for the amount of his claim, and defendants appealed to the Circuit court of Cook county. The transcript of the proceedings was filed in the clerk's office of the Circuit court October 16, 1928. June 2, 1930, the case was reached for trial and the defendants failing to appear the court ordered the appeal dismissed for want of prosecution. June 9, 1930, the order of dismissal was set aside and the cause reinstated. June 16, 1930, there was a jury trial and at the close of plaintiff's case the court instructed the jury to find defendant Sullivan not guilty. The jury disagreed as to defendant Marcellus and they were discharged. Nearly three years afterward, May 8, 1933, the case was again reached for trial and an order was entered reciting that, defendant Marcellus having failed to prosecute her appeal, it was dismissed on motion of plaintiff's attorney for want of prosecution, and a writ of procedendo was awarded. May 26, 1933,

APPELLATE COURT  
OF THE DISTRICT OF COLUMBIA  
JAMES EARL RAY  
Appellant  
vs.  
UNITED STATES  
Appellee

274 I.A. 652

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal James Earl Ray seeks to reverse an order entered by the District Court of Cook County May 26, 1968, vacating an order entered May 8, 1968, by which defendant's appeal from a judgment entered by a Justice of the Peace was dismissed for want of prosecution.

September 27, 1968, James Earl Ray brought suit before a Justice of the Peace against Anna Karselins and John Sullivan for recovery of \$200 which he claimed for damages to his automobile. There was a jury trial and a verdict and judgment in plaintiff's favor against the defendants for the amount of his claim, and defendants appealed to the District Court of Cook County. The transcript of the proceedings was filed in the clerk's office of the District Court October 14, 1968. June 2, 1969, the case was reached for trial and the defendant failing to appear the court ordered the appeal dismissed for want of prosecution. June 2, 1969, the order of dismissal was set aside and the cause retried. June 18, 1969, there was a jury trial and at the close of plaintiff's case the court instructed the jury to find defendant Sullivan not guilty. The jury disagreed as to defendant Karselins and they were discharged. Nearly three years afterward, May 8, 1968, the case was again reached for trial and an order was entered vacating that defendant Karselins having failed to prosecute her appeal, it was dismissed on motion of plaintiff's attorney for want of prosecution, and a writ of prohibition was awarded. May 26, 1968,



defendant filed a petition which set up the order of May 8, 1933, dismissing the defendant's appeal, and averred that defendant's attorney was absent on account of illness, and a copy of the attending physician's certificate was attached to the petition. On the same day the court entered an order vacating the order of May 8th, and plaintiff prosecutes this appeal.

The order of May 8th dismissing the appeal for want of prosecution with procedendo was entered during the April term of the Circuit court of Cook county. The May term began May 15, 1933, and the order appealed from was not entered until May 28th, which was during the May term. The order dismissing the appeal was a final order and at the close of the April term the court was without authority to vacate or set it aside. McGord v. Briggs & Turivas, 338 Ill., 158. No attempt was made by defendant to bring herself within the provisions of Section 39 of the old Practice act. In these circumstances the court had no power, after the April term, to enter the order appealed from and it is therefore reversed.

ORDER REVERSED.

Hatchett, P. J., and McGurely, J., concur.

Defendant filed a petition with the court on May 6, 1933, claiming the defendant's appeal, and averred that defendant's attorney was shown on account of illness, and a copy of the attending physician's certificate was attached to the petition. On the same day the court entered an order granting the order of May 6th, and dismissing the appeal.

The order of May 6th dismissing the appeal was void of prosecution with HERRINGHAM was entered during the trial term of the circuit court of Cook county. The day term began May 13, 1933, and the other appealed from was not entered until May 13th, when was during the day term. The order dismissing the appeal was a final order and at the close of the April term the court was without authority to vacate or set it aside. McCabe v. Herringham, 238 Ill. 120. No attempt was made by defendant to bring himself within the provisions of section 36 of the old practice act. In these circumstances the court had no power, after the April term, to enter the order appealed from and it is therefore reversed.

Reversed.

Reversed, 238 Ill. 120, and reversed, 238 Ill. 120.

36785

BEN BRODSKY,  
Appellee,

v.

SEARS COMMUNITY STATE  
BANK, a corporation,  
Appellant.

15 H  
APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

274 I.A. 652

MR. PRESIDING JUSTICE SULLIVAN  
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment for \$1,218 rendered against it in favor of plaintiff in an action on a written contract tried by the court without a jury.

Plaintiff's amended statement of claim alleged that August 8, 1928, he purchased certain real estate bonds from the Community State Bank (hereinafter referred to as the old bank), afterward consolidated with defendant, Sears Community State Bank, for \$1,200, plus \$10.60 accrued interest; that defendant was indebted to him for \$1,138, plus accrued interest, for moneys due and owing to him under and by virtue of a written contract executed by the old bank through its agent, wherein it agreed to repurchase the bonds at any time at 99 and accrued interest, in consideration of which and in reliance upon its agreement to repurchase, he purchased from the old bank the first mortgage real estate bonds described in the following bill of sale and memorandum agreement:



100-10000

ALL INFORMATION CONTAINED  
HEREIN IS UNCLASSIFIED

10

ALL INFORMATION CONTAINED  
HEREIN IS UNCLASSIFIED  
DATE 10/10/00 BY 60322

RECEIVED FROM MEMORIAL BANK

ON 01/10/00

ST. I.A. 652

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

By this report defendant seeks to reverse a judgment  
 for \$1,118 rendered against it in favor of Plaintiff in an  
 action on a written contract filed by the court without a jury.  
 Plaintiff's asserted statement of claim alleged that  
 on or about 1978, he purchased certain real estate from the  
 Community Bank (hereinafter referred to as the old bank).  
 Plaintiff's asserted statement with attached, dated January 1978  
 from the old bank, dated 1978, stated that the old bank  
 was indebted to him for \$1,118, plus accrued interest. The money  
 due and owing to him under and by virtue of a written contract  
 executed by the old bank through its agent, wherein it agreed  
 to reimburse the bank at any time of \$5 and accrued interest,  
 in consideration of which and in reliance upon the agreement  
 to reimburse, he purchased from the old bank the first mortgage  
 real estate bonds described in the following bill of sale and

Exhibit A

"COMMUNITY STATE BANK  
3600 Roosevelt Rd.  
BOND AND MORTGAGE DEPARTMENT  
Chicago

August 8, 1928

BEN BRODSKY

1435 S. Spaulding Avenue

For Sale of 1200 Par Value

Aranoff @ \$100.00.....\$1200.00

Accrued interest from June

15th to Aug. 8th

@ 6%

1 mo. 23 days

10.60

\$1210.60

Bond Nos. 206-252-121-119

Maturity 12/15/34

Community State Bank

Paid

August 8, 1928

Note Teller

Repurchasable at any time @ 98 and accrued interest.

COMMUNITY STATE BANK  
Per L. W. Miller"

Many defenses are set up in defendant's affidavit of merits and many reasons are urged by it for the reversal of the judgment in this cause on the record presented, but in view of the recent pronouncement of our Supreme court in Knass v. Madison and Kedzie State Bank, 354 Ill. 554, it is necessary to consider only the question as to whether the agreement alleged and received in evidence, which we will assume was an agreement by defendant to repurchase the bonds from plaintiff "at any time @ 98 and accrued interest," is ultra vires the power of the bank and against public policy and, therefore, unenforceable.

Considering substantially the same form and character of repurchase agreement and determining the identical question presented in the instant case as to the illegality of same, the court in the Knass case, supra, held that such a repurchase agreement entered into by a bank, through its officers or agents, was ultra vires, contrary to the statute of the State of Illinois, and against





public policy and, therefore, void and unenforceable.

In conformity with the law applicable to this cause as thus enunciated by our Supreme court, the judgment of the Municipal court of Chicago is reversed.

REVEREND.

Gridley and Scanlan, JJ., concur.

people living and investing with me and my family.  
 In connection with the law regarding the same  
 as that submitted by our fathers about the judgment of the  
 Council of State in 1800.

RECEIVED

COPIES AND ORIGINALS IN 1800

36813

I. REVITZ,  
Appellee,

v.

SUPERIOR LOAN & MORTGAGE  
COMPANY,  
Appellant.

167  
APPEAL FROM MUNICIPAL

COUNT OF CHICAGO.

274 I.A. 652<sup>3</sup>

MR. PRESIDING JUSTICE SULLIVAN  
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Superior Loan & Mortgage Company, a corporation, defendant, from a judgment entered against it on the verdict of a jury for \$814.66.

Plaintiff's statement of claim alleged that March 7, 1929, he lent \$2000 to the Superior Loan & Mortgage Company, a corporation (hereinafter designated as the corporation), then operating as a common law trust under the name of the Superior Loan & Mortgage Association (hereinafter referred to as the association); that the loan was repayable on demand with interest at 7% per annum; that on or about April 1, 1930, he received on account thereof \$1335; that on or about April 28, 1930, defendant corporation was formed with a capital stock of \$250,000; that all of the assets of the association were assigned to the corporation; that among the liabilities assumed by defendant was the \$665 balance due on plaintiff's loan with 7% interest on \$2,000 from March 7, 1929, to April 1, 1930, and 7% interest on \$665 from April 1, 1930, to the date of judgment.

Defendant's affidavit of merits made in its behalf by its secretary, Louis Sandler, denied that plaintiff lent defendant \$2000, or that he had been repaid \$1335 on account of such loan.



UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE ATTORNEY GENERAL

284 I.A. 625

IN RE: THE ESTATE OF JAMES H. HARRIS, DECEASED.  
JAMES H. HARRIS, DECEASED, PLAINTIFF;  
THE UNITED STATES OF AMERICA, DEFENDANT.

This is an appeal by the executor James H. Harris of a corporation, defendant, from a judgment entered against it on the verdict of a jury for \$10,000.

Plaintiff's statement of claim alleged that James H. Harris, in 1900, was the executor of the estate of James H. Harris, a corporation (hereinafter designated as the corporation), then operating as a common law trust under the name of the executor James H. Harris (hereinafter referred to as the association); that the association was liable on demand with interest at 7% per annum; that on or about April 1, 1900, he received on account thereof \$10,000; that on or about April 20, 1900, defendant corporation was formed with a capital stock of \$250,000; that all of the assets of the association were assigned to the corporation; that among the liabilities assumed by defendant was the \$10,000 balance due on plaintiff's loan with 7% interest on \$2,000 from March 7, 1900, to April 1, 1900, and 7% interest on \$8,000 from April 1, 1900, to the date of judgment.

Defendant's affidavit of merits made in the behalf of the corporation, which admits that plaintiff had a loan of \$10,000, or that he had been repaid \$10,000 on account of such loan.

The affidavit admitted the organization of the corporation April 28, 1930, but denied that all of the assets of the association were assigned to the corporation, or that defendant assumed any liability to pay plaintiff \$668 with interest. It stated that on and before March 7, 1929, the association was engaged in the business of making small loans; that the capital for these loans was furnished both by members of the association and nonmembers who deposited funds with the association in order to participate in its profits; that the association issued to nonmembers, who deposited funds for investment, a receipt designated a certificate of deposit, which constituted the contract between the association and the nonmember; and that March 7, 1929, plaintiff deposited with the association \$2000 and received the association's certificate of deposit for that amount.

The affidavit alleged that shortly prior to April 28, 1930, it was decided to reorganize the association as a corporation; that subscriptions for stock of the proposed corporation were signed by nonmembers holding certificates of deposit as well as by members of the association; that thereupon defendant was organized as an Illinois corporation; that plaintiff was one of the original subscribers for 20 shares of the capital stock of the corporation at the par value of \$2000, and by his subscription agreement transferred and assigned his interest in his \$2,000 certificate of deposit in the association in full payment of the capital stock of the corporation subscribed for by him; that pursuant to this subscription agreement defendant delivered to plaintiff its certificate of stock dated April 30, 1930, for 20 shares of capital stock of defendant of the par value of \$100 a share and received in payment therefor plaintiff's certificate of deposit for \$2000 in the association.

The affidavit also averred that April 8, 1930, plaintiff

The attorney advised the corporation at the corporation's first meeting, held on May 1, 1930, that all of the assets of the corporation were assigned to the corporation, as well as the business and the business of the corporation. It stated that on May 1, 1930, the corporation was engaged in the business of selling small loans; that the capital for these loans was furnished both by members of the corporation and nonmembers who deposited funds with the corporation in order to participate in the project; that the corporation issued to nonmembers, who deposited funds for the purpose, a receipt certifying a certificate of deposit, which contained the contract between the corporation and the nonmember; and that on May 1, 1930, the corporation received the certificate of deposit for that

The attorney advised that shortly after on April 25, 1930, it was decided to reorganize the corporation as a corporation; that subscriptions for stock of the proposed corporation were signed by nonmembers holding certificates of deposit as well as by members of the corporation; that nonmember subscribers were organized as an Illinois corporation; that plaintiff was one of the original subscribers for 25 shares of the capital stock of the corporation at the par value of \$1000, and by his subscription agreement transferred and assigned his interest in his \$2500 certificate of deposit to the corporation in full payment of the capital stock of the corporation subscribed for by him; that plaintiff's certificate of deposit was assigned to plaintiff the certificate of stock of the corporation, and the 25 shares of capital stock at par value of \$1000 a share and received in payment thereof; that plaintiff's certificate of deposit for \$2500 in the corporation. The attorney also advised that on May 1, 1930, plaintiff



applied to defendant for a loan of \$1500; that the loan was made on that date and he executed and delivered to defendant his promissory note for \$1500; and that defendant is not indebted to plaintiff in any sum, but plaintiff is indebted to defendant in the sum of \$1500.

Defendant contends that plaintiff is attempting to evade the effect of his signed agreement of April 7, 1930, to subscribe for capital stock of the corporation; that this agreement is an effectual bar to his recovery in this cause; and that, inasmuch as he purchased 20 shares of defendant's stock with his \$2000 certificate of deposit in the association, he can not now recover that \$2000 or any part of it on the theory that it still remains in the form of a loan or deposit.

Plaintiff's theory is that March 7, 1929, he lent the association \$2000; that he was repaid \$1335 of the loan in April, 1930, and that the corporation is still indebted to him for the \$665 balance of the loan with interest; that his signature to the stock subscription agreement and the note for \$1500 were procured by fraud and that he signed those documents at the time he was repaid \$1335, after he had been advised by the secretary of the corporation, in whom he reposed confidence, that they were simply a receipt or paper for the records; that he was illiterate and did not know the contents of the instruments; and that these were questions of fact upon which the determination of the jury and the judgment of the trial court ~~known~~ should be held to be conclusive.

For a proper understanding and determination of the questions presented by this appeal it is necessary to detail the evidence somewhat fully.

It appeared that Louis Sandler was secretary of defendant, which was incorporated April 28, 1930, and that prior thereto he was

applied to defendant for a loan of \$1000; that the loan was made  
on that date and he executed and delivered to defendant his  
promissory note for \$1000; and that defendant is not indebted to  
plaintiff in any way, but plaintiff is indebted to defendant in  
the sum of \$1000.

Defendant contends that plaintiff is attempting to evade  
the effect of his signed agreement of April 7, 1930, in substance  
for equal share of the corporation that this agreement is an  
effective bar to his recovery in this court; and that, although he  
he purchased 25 shares of defendant's stock with his \$2500 worth-  
while of deposits in the association, he can not now recover that  
\$2500 or any part of it on the theory that it will remain in the  
form of a loan or deposit.

Plaintiff's theory is that March 7, 1930, he loaned the  
association \$2500; that he was repaid \$1250 of the loan in April,  
1930, and that the corporation is still indebted to him for the balance  
of the loan with interest; that his signature to the stock  
subscription agreement and the note for \$2500 were made at the same  
time and that he signed these documents at the time he was repaid \$1250,  
after he had been advised by the secretary of the corporation, in  
plain and repeated language, that they were simply a receipt or paper  
for the money that he was receiving and did not have the same  
force of the instrument; and that these were reasons of fact upon  
which the determination of the jury and the judgment of the court  
should be held to be conclusive.

For a proper understanding and determination of the ques-  
tion presented by this appeal it is necessary to detail the cir-  
cumstances of the case.  
It appears that Louis Mueller was secretary of defendant  
which was incorporated April 22, 1930, and that before the time



secretary of the same company operating as a common law trust under the name of the Superior Loan & Mortgage Association; that while secretary of the latter corporation he met plaintiff in the Community State Bank, and, upon ascertaining that he had \$2000 on deposit there, urged him to deposit that amount with his association, promising him that it could be withdrawn at any time and would draw interest at the rate of 7% per annum, and that if he left it with the association for one year or longer it would draw interest at the rate of 11% per annum; that Sandler wrote out a check for \$2000, which plaintiff signed and delivered to him, and a few days thereafter, March 7, 1929, plaintiff received from the association its certificate of deposit for that amount, which provided:

"This certificate of deposit bears interest from date hereof at the rate of 7% per annum if said amount is on deposit for any period less than one year, and at the rate of 11% per annum for each full year that amount is on deposit with the undersigned."

It further appeared that plaintiff had been a dry goods peddler; that he had resided in Chicago 10 years; that he had come here from Canada where he had resided two or three years subsequent to his arrival from Russia; that he had some limited financial and business experience; and that plaintiff had on three previous occasions deposited with or lent money to the association and in these instances his money had been repaid.

Plaintiff testified in his own behalf that all of his dealings with either the association or the corporation were with Sandler; that he waited a year before requesting payment of his \$2000, so that he might get 11% interest; that he then went to the association's office and asked Sandler for his money. His testimony as to what occurred on that and his next visit to Sandler's office is best stated in his own language, as follows:

"He said 'I can't give you no money.' He was caught in the bank - what bank I don't know. I said, 'Mr. Sandler, when you going to give me money?' He said, 'You know me, you have confidence



Secretary of the same company operating as a common law firm  
under the name of the American Bank & Trust Association that  
this Secretary of the latter corporation he was retained in the  
company that said, and, when asked what he had done in  
company with him to obtain that amount with his association,  
promising him that it would be withdrawn at any time and would grow  
interest at the rate of 12 per annum, and that it he left it with  
the association for one year or longer it would have interest at  
the rate of 12 per annum; that another witness and a third, the  
which Plaintiff signed and delivered to him, and a few days later  
after, known to him, Plaintiff received from the association the  
sum of \$10,000.00 for said money, which witness

"This certificate of deposit shows interest from date  
period at the rate of 12 per annum it said amount is an amount  
yet any period less than one year, and at the rate of 12 per  
annum for each full year that amount is on deposit with the United  
States Bank."

Plaintiff appears that Plaintiff had been a tip bearer  
between him and his retained in Chicago 10 years; that he had some  
other firm business where he had retained and an other person independent  
of his retained firm business; that he had some other business and  
various expenses; and that Plaintiff had an other business  
various deposited with at least money at the association and in  
some business his money had been retained.

Plaintiff testified in his own behalf that all of his  
business with the association was conducted by the association with him  
and that he never received any money from the association; that he  
never saw the money and did not know what he had sent to the  
association; that he never saw the money; that he never saw the money  
as to what occurred on that and his name with the association's office  
is that stated in his own testimony, as follows:

"He said 'I don't know no money', he was coming in  
the bank - and then I saw the money, I said, 'Mr. Plaintiff, when you  
come to give me money, he said, 'I don't know me, you have confidence

in me five years. Thirty days later you will get your money.'

"I went away. Thirty days later, I think a month later, I come up to Mr. Sandler and ask him for the money. He said 'Mr. Nevitz, you have to wait. We don't pay to nobody.' I say, 'Mr. Sandler, I take your word; I need the money.' I said, 'I issue checks; you said to do that, thirty days later.' He said, 'How much you issue checks?' I said, 'Thirteen hundred or some, I don't know how much, I didn't figure.' He said, 'I can't do it, but you know me a long time, I give you.' - He made check \$1335. I said, 'How much an amount is \$1335? Why not even thirteen hundred or thirteen fifty?' He said, 'Don't worry; you get your money.'

"He brought me papers and books to sign. I said, 'How much you want me to sign for my money?' He said, 'Are you afraid? You will get your money.'"

As to subsequent occurrences plaintiff testified:

"So after that I seen him almost every two weeks; I was depositor in the same bank Mr. Sandler. Every time I saw him he said, 'You get it, you will get it, you will get it.'

"He dragged me along here until 1931, I think June; I come up and I said, 'Mr. Sandler, you dragged me here; I need the money. I do need money now. I got all the arrangements, my daughter is going to get married 15th of June; I need the balance. You got to pay it, or I start suit.' He said, 'You start to sue me, God bless you. You start to suit me, we get a judgment against you.' I said, 'What do you mean?' He said 'We incorporate.' I said 'When?' 'Last year.' I said, 'I don't think so. If you have a corporation, other people's money.' He said, 'The corporation take over and go to pay everybody after all.'"

Plaintiff also testified that Sandler insisted that he turn over to him the \$2000 certificate of deposit before he would pay him the \$1,335 and he did so.

Sandler testified in defendant's behalf that following a meeting of all of the members of the association April 6, 1930, plaintiff came to the office of the company April 7, 1930, and inquired as to what had happened at the meeting; that he told him they decided to incorporate and that everyone who wished to become a stockholder in the corporation had to subscribe for stock; and that plaintiff signed the "stock subscription agreement" at that time. (The agreement authorized certain trustees therein named to act for the subscriber and by its terms transferred and assigned the \$2000 certificate of deposit to them to be in effect surrendered to defendant in payment of 20 shares of its capital stock for the subscriber.) He testified further that the next day, April 8, 1930, plaintiff, having made no request or demand for his \$2000







loan or deposit, or any part of it prior to that time, came to defendant's office and told Sandler that he wanted to make a loan; that Sandler told him he could have a loan of \$1500, which he agreed to take; that after plaintiff signed the note for \$1500 he was given a check for \$1335 and he delivered to Sandler, upon his demand, his \$2000 certificate of deposit (which under the subscription agreement of the day before had been transferred and assigned in payment of 20 shares of defendant's stock) as security for payment of the \$1500<sup>note</sup>; that the \$165 difference between the \$1500 loan as evidenced by the note and \$1335 received by plaintiff represented a prepayment of interest on the loan for eighteen months at the rate of 7%; that the note was payable in 75 weeks at the rate of \$20 a week; that plaintiff would have been repaid his \$2000 deposit any time upon his request or demand; and that he delivered to plaintiff personally the certificate for 20 shares of stock in defendant corporation about April 30, 1930.

On cross-examination Sandler testified that no payment was made by plaintiff on the \$1500 note; that no effort was made to exact payment of same until December 24, 1932, when judgment was confessed on it after action in the instant case had been instituted and summons served on plaintiff November 13, 1932; and that the only letter requesting payment that he distinctly remembered sending plaintiff was that of July 22, 1932, after defendant had received plaintiff's attorneys' letters of July 3 and 20, 1932, demanding payment of the \$665 balance due plaintiff.

In rebuttal plaintiff denied that he signed the subscription agreement April 7, 1930, or that he even saw Sandler on that day, and he also denied that he ever received a certificate for 20 shares of stock of defendant corporation. He testified that when he signed the note in evidence there was nothing on the paper except the small





print; that the blank spaces were not filled in and that Sandler told him, "this is a receipt for the money what you got;" that, when Sandler asked him to sign the instrument in evidence as a stock subscription agreement, he asked Sandler how many signatures he wanted him to sign and Sandler said, "we have to keep a record - you have full confidence in me five or six years, and I wouldn't cheat you;" and that he then signed it. He further testified that at the time he received the \$1335 he signed both documents without knowledge of their contents, relying entirely upon the honesty of Sandler.

Defendant declares that the present status of the parties is that defendant does not owe plaintiff \$665 or any other sum of money; that plaintiff owns 20 shares of stock in defendant corporation; and that plaintiff owes defendant \$1500 on the note. It insists that plaintiff is bound by his signature to the aforementioned subscription agreement, which modified his original contract as represented by his \$2000 certificate of deposit, and extinguished any obligation on the part of either defendant or its predecessor association on that certificate, and that this is true even though plaintiff was illiterate when he signed it. It is urged that a written contract can not be voided, varied or contradicted by parol evidence and several cases are cited to the effect that even an illiterate is bound by his written contract; that if he can not read it constitutes negligence on his part to sign a contract without having it read to him.

We fully agree that is the established law, but none of the cases cited is applicable to the situation presented by the case at bar, inasmuch as it did not appear in any of them that the signature of the party was obtained by fraud, duress or misrepresentation. We are of the opinion that the rule controlling the determination of the question presented in this cause is





correctly set forth in Fowler Cycle Works v. Fraser & Chalmers,

110 Ill. App. 126, 129-30, where the court said:

"The rule is elementary in this state, where the distinction between law and equity is preserved, that the fraud which will defeat an action at law upon a sealed instrument is confined to fraud in the execution of the instrument, such as the misreading of the instrument, the substitution of one paper for another, or where, by other device or trickery, the maker was induced to sign and seal it, believing at the time he was signing and sealing a different paper."

The same rule is enunciated in Whitney & Starrette Co.

v. O'Rourke, 172 Ill. 177, 182-83, where the following language is used by the court.

"But the evidence shows that the appellee was an ignorant man, and could not read or write, and signed the receipt by making his mark. There is evidence tending to show, that he did not understand the paper signed by him to be a release of damages. The question, whether or not the appellee understood the paper signed by him to be a release, or a mere receipt, was submitted to the jury by instructions given both for the appellant and the appellee. The jury have found that he did not understand it to be a release."

Defendant's counsel stresses and reiterates the fact that plaintiff did not testify that he was unable to read the English language. That is true. But we are constrained to believe that when he was interrogated as to whether he was able to read and write the English language he was not afforded a fair opportunity to answer the question. The question was followed by objection and extended colloquy between counsel and the court, and when the court finally decided that he might answer the question was not repeated to him, and his answer was "No, I cannot write." However, his ability or inability to read English can not alone control the decision of this cause.

Whether or not defendant's signature to the stock subscription agreement and the note for \$1500 was procured by fraud or trickery, at the time plaintiff received the \$1335, was peculiarly a question for the jury to determine from all the facts and circumstances in evidence.

It was their duty to and they unquestionably did consider



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that it was Sandler who wrote out the check for plaintiff at the time of his deposit or loan of \$2000 to the association; that plaintiff waited a year so that he would get 11% interest instead of 7% for his money; that about April 1, 1930, when he first requested his money, he was told to come back in thirty days; that April 7, 1930, when it is claimed that he signed the stock subscription agreement, transferring and assigning his \$2000 certificate of deposit in payment of the 20 shares of stock in the corporation, he was not asked by Sandler for his certificate of deposit, although the agreement itself provided that it be turned over to the trustees for cancellation; that it has not yet been cancelled and that there was no warrant for the issuance of the corporation's certificate of stock to plaintiff until the certificate of deposit was cancelled; that the very next day, April 8, 1930, according to Sandler, plaintiff discovered that he needed money and requested a loan from the association and that he acquiesced in Sandler's action in charging him \$165 for the purported \$1500 loan, allowing him but \$1335, when, again, according to Sandler, he could have collected the face value of his \$2000 certificate of deposit plus interest if he had not assigned it the day before; that Sandler testified that the \$165 deduction from the amount of the loan represented a prepayment of interest on the note at the rate of 7% for 18 months when, in fact, interest at 7% did not figure that amount either for 18 months or for 75 weeks, the actual term of the note; that, according to Sandler, he demanded as security for the note the certificate of deposit which he knew was worthless, it having been transferred and assigned the previous day by the subscription agreement executed in Sandler's presence and delivered to him; that although the note was payable at the rate of \$20 a week and not a single payment had been made on it, no effort was

that it was London who gave him the check for payment of the  
 time of his deposit on loan of \$1000 to the association; that  
 plaintiff waited a year or more before he made any demand  
 of the money; that about April 1, 1900, when he first  
 requested his money, he was told to come back in thirty days; that  
 April 7, 1900, when it is claimed that he signed the check and  
 assigned the same, he was told to come back in thirty days; that  
 after the check was cashed, the money was paid to the association  
 and deposited in payment of the 10 shares of stock in the company.  
 After he was not asked by London for his certificate of deposit,  
 although the agreement itself provided that it be turned over to  
 the association for cancellation; that it had not yet been cancelled  
 and that there was no warrant for the issuance of the corporation's  
 certificate of stock to plaintiff; that the certificate of deposit  
 was cancelled; that the very next day, April 8, 1900, according  
 to London, plaintiff discovered that he needed money and requested  
 a loan from the association and that he requested the London's  
 action in borrowing the \$1000 for the purpose of buying stock, allowing  
 him his first, second, third, according to London, he would have  
 collected the face value of his \$1000 certificate of deposit plus  
 interest if he had not assigned it the day before; that London  
 admitted that the \$1000 deduction from the amount of the loan  
 represented a prepayment of interest on the note at the rate of 10  
 for 18 months then, in fact, interest at 10 did not figure that  
 amount either for 18 months or for 75 weeks, the actual term of  
 the note; that, according to London, he demanded an account for  
 the note the certificate of deposit which he knew was worthless,  
 it having been cancelled and assigned the previous day to the  
 association; that London admitted that London's promise and failure  
 to him that although the note was payable at the rate of 10 for  
 18 months and not a single payment had been made on it, he still was



made to enforce its payment until after summons had been served on defendant in this cause; and that Sandler, having in his possession the certificate of deposit he knew to be worthless as security for the \$1500 note, testified that he personally delivered to plaintiff the certificate for 30 shares of defendant's stock instead of substituting it for the worthless security on the note held by him in the company's behalf.

Defendant positively asserted in both its original and amended affidavit of merits that it received plaintiff's \$2000 certificate of deposit in payment of 30 shares of the corporation's stock at the time of the execution of the subscription agreement, and there was no averment that Sandler demanded and received the certificate of deposit as security for the alleged \$1500 loan represented by the note at the time that transaction was claimed to have taken place. Defendant's original theory as to the time of the delivery of the certificate of deposit to it appears to have been abandoned on the trial.

We are clearly of the opinion that the jury was justified in the conclusions reached by it. Practically every circumstance in the case not only indicates, but demonstrates, that plaintiff's signature to both the note and the stock subscription agreement was secured by deception or trickery. We are convinced from a painstaking examination and consideration of all the evidence that, because of the confidence reposed in him, plaintiff trusted Sandler implicitly when he advised him that it was just a receipt and paper for the records that he signed.

There are so many significant admitted or proven facts in this record that stand out as veritable beacons to light the way to the truth that it was well-nigh impossible for the jury to be misled in the trial of this cause. It is difficult to conceive



... to return the property which was taken from him ...  
... defendant in this account and that defendant, having in his  
possession the certificate of deposit he knew to be worthless  
as security for the \$1000 note, testified that he personally  
delivered to plaintiff the certificate for the amount of \$1000 ...  
... stock instead of negotiating it for the purchase money of the  
note held by him in the company's behalf.

... defendant's position was that the certificate was  
issued at the time of the execution of the subscription agreement,  
and there was no agreement that transfer should be received the  
certificate of deposit as security for the \$1000 loan  
represented by the note at the time that transaction was claimed to  
have taken place. Defendant's original theory as to the time of  
the delivery of the certificate of deposit is it appears to have  
been abandoned on the trial.

... We are aware of the opinion that the jury was justified  
in the conclusion reached by it. Essentially every circumstance in  
the case not only indicates, but demonstrates, that plaintiff's  
agreement to keep the note and the stock subscription agreement was  
secured by depositing the certificate. ...  
... consideration and consideration of all the evidence that, because of  
the testimony of the witness, plaintiff's theory is not supported  
when he advised him that it was that a receipt and paper for the  
certificate should be signed.

... There was no such significant admitted or proven facts  
in this case that would be a sufficient basis for the jury to be  
of the view that it was well-warranted for the jury to be  
informed in the trial of this case. ...

of an experienced officer of a company, engaged in the small loan business, overlooking or neglecting to insist on the delivery to it of a \$2000 certificate of deposit, the delivery of which was provided for in his stock subscription agreement. It is just as difficult to conceive of the same officer, the very next day, taking the worthless instrument, known by him to be such, as security for a note evidencing a \$1500 loan. It is even more difficult to conceive of his permitting a \$1500 loan, payable at the rate of \$20 weekly, to run approximately two years and eight months without making any effort to collect it.

Then we behold the same secretary graciously and benevolently delivering to a \$1500 debtor, from whom he had received worthless security, a perfectly good certificate for 20 shares of defendant's stock and permitting the note to remain unsecured. Is it not also incomprehensible that plaintiff would on one day divest himself of a \$2000 certificate of deposit, that defendant's secretary testified was collectable at any time with 11% interest, and the very next day discover that he had to borrow \$1335 and pay \$165 to the same company for the privilege of making the loan?

Defendant's counsel concedes that Sandler made a mistake in delivering the certificate of stock to plaintiff, but attempts to excuse Sandler's apparent lapse in conduct by stating on page 39 of defendant's brief that Sandler, as secretary of the small loan company, "did not know that he had to keep it as collateral." The failure of defendant to attempt to enforce payment on the note counsel characterizes on page 45 of defendant's brief as "a careless delay in demanding payment." Plaintiff's conduct in assigning April 7, 1930, his \$2000 certificate of deposit for which Sandler testified he would have been paid full value that day, the next day, or in fact any day, is hardly reconcilable with plaintiff's request

of an experienced officer of a company, engaged in the mail business, exercising no objection to having the delivery of a 1930 certificate of deposit, the delivery of which was provided for in his stock subscription agreement. It is said that the certificate is operative of the same effect, the very same day, being the witness' statement, known by him to be such, as usually for a wife obtaining a 1930 loan. It is even more difficult to conceive of his permitting a 1930 loan, payable at the rate of 4% weekly, to be approximately two years and eight months ahead.

What was the result of this?

There are details and some necessary questions and answers.

Initially delivered to a 1930 holder, from whom he had received various amounts, a perfectly good certificate for the amount of defendant's stock and promising the same to remain unchanged, it was also inconceivable that plaintiff would on one day direct himself of a 1930 certificate of deposit, that defendant's necessary certificate was collected at any time with his interest, and the very next day discover that he had to borrow \$1000 and pay 11% on the

same company for the privilege of making the loan?

Defendant's counsel conceded that plaintiff took a 1930

in delivering the certificate of stock to plaintiff, but otherwise

in every detail's agreement before he could be called on page 10

of defendant's brief that plaintiff, as contrary to the facts, from

response, "It was said that he had to pay 11% on the loan."

Failure of defendant to attempt to deliver payment on the date

announced defendant on page 43 of defendant's brief as "necessary

delay in delivering payment." Plaintiff's counsel in arguing

page 7, 1930, his 1930 certificate of deposit for which plaintiff

received no value have paid full value 1930, the next day,

at 12:00 noon day, he hardly reconcilable with plaintiff's request



for a loan from the same company the very next day, and can not be explained away by defendant's counsel's statement on page 44 of defendant's brief that "over night and following his execution of the stock subscription agreement, Reivitz may have repented of his action." Such an argument is illogical and unconvincing. If a man in plaintiff's circumstances needed \$1500, or \$1535, April 8, 1930, he must have known that he needed it April 7, 1930. If Sandler's testimony that plaintiff could have realized the full value of his certificate of deposit, plus 11% interest, April 7 or 8, 1930, were true, what reasonable man could or would believe that instead of turning it in for needed cash he would have traded it in for stock in the corporation and go to the same company the very next day and pay \$165 for the privilege of securing \$1335 on a \$1500 loan, repayable at the rate of \$20 a week for 75 weeks.

We find no merit in defendant's contention and are of the opinion that every significant fact in the record supports plaintiff's theory that both the subscription agreement and the note were signed by him when he was repaid \$1335 on account of his \$2000 certificate of deposit on the fraudulent representation of Sandler, secretary of defendant, and its predecessor, that the papers presented for his signature were nothing more than a receipt for the money paid and a document necessary for the company's records.

The verdict in this case is not only not against the manifest weight of the evidence but it is clearly and abundantly supported by competent evidence.

As to defendant's contention that inasmuch as plaintiff's money was deposited with or lent to defendant's predecessor association no liability attached to defendant corporation and none was shown on the trial, it is sufficient answer to state that defendant admitted both in its original and amended affidavit of merits that the officers

for a loan from the same company. The very next day, and was not  
he explained away by defendant's counsel's statement on page 44  
of defendant's brief that "over eight and following his execution  
of the check... delivery was made... his action." Such an argument is illogical and unsatisfactory.

It is a well known fact that...  
April 8, 1930, he must have known that he needed it April 7, 1930.  
It is further a fact that plaintiff would have realized the full  
value of his certificate of deposit, and his interest, April 7 or  
8, 1930, very soon, and defendant was aware of this. Defendant's  
instead of paying it in for weeks could he would have known it in  
for cash in the corporation and to be the same company the very  
next day and pay this for the privilege of securing \$1000 in a  
fixed loan, repayable at the rate of \$100 a week for 10 weeks.

It is a fact that no more in defendant's corporation was one of  
the parties that every significant fact in the present case.  
plaintiff's theory that both the subscription agreement and the  
note were signed by him when he was repaid \$1000 on account of  
his \$1000 certificate of deposit on the defendant's corporation  
of plaintiff, secretary of defendant, and his testimony, that the  
note was signed for his certificate was decided upon from a receipt  
for the money paid and a statement made for the company's records.

The verdict in this case is not only not against the  
weight of the evidence but it is clearly and abundantly

supported by competent witnesses.

It is defendant's contention that because of plaintiff's  
theory was repaid with or loan to defendant's corporation...  
no liability attached to defendant corporation and none was shown on  
the trial. It is further shown in this case that...  
both in the original and amended exhibits of notes that the officers



and trustees of the association recommended that the association be reorganized as a corporation and the corporation was organized. The situation presented here is not that of the sale of all or part of the assets of a company or corporation to another corporation for a valuable consideration, but is that of a successor corporation taking over in their entirety all of the assets of its reorganized predecessor. That the corporation recognized its responsibility and liability is evidenced by Sandler's testimony that defendant paid all of the holders of certificates of deposit, who did not subscribe for stock in the corporation, the amounts represented by their certificates.

The principle is well established that if the assets of a company (association operating as a common law trust or corporation) which thereafter ceases to function, are turned over to a successor corporation, without the payment of any value but merely on an exchange of stock, then the successor corporation impliedly assumes the debts of the predecessor company.

This doctrine is well stated in Irvin Operating Co. v. Southwestern Electric Co. (Okla.) 174 Pac. 1069, 1973, where the court said:

"We are of the opinion that such a transaction was unconscionable; that it was in effect an effort to defraud the creditors of the old corporation, or that would operate as a fraud against such creditors; that the new corporation is a mere continuation of the old one, under a slightly different name; and that a creditor of the old corporation may look to the new one for payment of its claim. We are supported in these conclusions by the ablest writers of our text-books and by decisions of our highest courts. The rule is thus stated in Thompson on Corporations (2d Ed.) sec. 6082:

"Succeeding corporations are not infrequently held liable where there may not be strictly a consolidation. Generally, if a new corporation is organized by the stockholders of an old concern and received the property of the old, the creditors of the old corporation may proceed directly against the new. This rule is applied especially where such arrangement and the transfer of the property is made for the purpose of defrauding the creditors of the old company. Thus a corporation composed of substantially the same stockholders, receiving without consideration all the property, including a certain contract for the sale of goods, for





the purpose and with the intent of defrauding the creditors of such former company, was held liable on a contract of the old company entered into before the transfer of the property. Where the consolidation results in terminating the existence of the constituent companies, and there is no agreement as to liabilities, the consolidated corporation will generally be entitled to all the property and will be answerable for all the liabilities of the old corporation. And if the successor is technically a new corporation, and the old has actually ceased to exist, and all its assets and franchises have passed to the new, and it is a mere continuation of the old, the liability continues. Neither law nor equity will permit one corporation to take all the property of another, deprive it of the means of paying its debts, enable it to dissolve its corporate existence, and place itself practically beyond the reach of creditors, without assuming its liabilities."

For the reasons stated herein the judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.





36828

JENNIE L. KOLB,  
Appellant,

v.

JEREMIAH W. MCGRAW,  
Appellee.

177  
APPEAL FROM SUPERIOR COURT,  
COOK COUNTY.

274 I.A. 652<sup>4</sup>

MR. PRESIDING JUSTICE SULLIVAN  
DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment entered for defendant, Jeremiah W. McGraw, upon a directed verdict in an action for fraud and deceit brought by Jennie L. Kolb, plaintiff.

Plaintiff's declaration consists of six counts. The first alleges that August 26, 1925, she owned real estate in Detroit, Michigan, and Windsor, Ontario; that defendant represented he had contracted to purchase and was about to acquire title to property at 4715 Malden avenue, Chicago, subject to a first mortgage of \$115,000 and a second mortgage of \$30,000; that he also represented to her the Malden avenue property was worth \$200,000, and was leased November 28, 1924, to certain tenants under a valid written lease for a period of ten years at a net annual rental of \$20,000; that the tenants had purchased, owned and placed in the building furniture at a cost of \$22,000, were responsible, had paid monthly rental under the lease and no rental concessions had been made to them; that all of these representations were false and made by defendant knowingly and wilfully for the purpose of inducing, misleading and defrauding plaintiff; that plaintiff, relying on these false representations, entered into a verbal agreement with defendant to give her Detroit, Michigan,

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• *Journal of Management Education* 31(10):1103-1115

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REVALUED DEBTED DEBITORS, AND  
THOSE WHO TO WALKED WITH GODLY.

This appeal seeks to reverse a judgment entered for defendant, Benjamin F. Newman, upon a divorce granted in an action for fault and assets brought by Emma L. Wells, plaintiff. Plaintiff's declaration consists of six counts. The first alleges that August 27, 1926, the same real estate in Chicago, Illinois, was owned, jointly and beneficially represented by Newman, Plaintiff, and Emma L. Wells, Defendant. It further alleges that Newman had control of the said real estate so far as it related to purchase and was about to mortgage same to property at 4718 Madison Avenue, Chicago, subject to a first mortgage of \$100,000 and a second mortgage of \$25,000; that he also represented in her the said Madison Avenue property was worth \$200,000, and was leased November 20, 1926, to certain tenants under a valid written lease for a period of ten years at a net annual rental of \$25,000; that the tenants had purchased goods and placed in the building furniture at a cost of \$25,000, were responsible, had paid monthly rental under the lease and no rental concessions had been made or given; that all of these representations were false and each of defendant Newman's and plaintiff's joint efforts to induce plaintiff to execute and deliver Plaintiff's deed to the said real estate, which would have transferred to Newman the title thereto, was fraudulent.

and Windsor, Ontario, property, one liberty bond and \$8,162.04 in cash for a one quarter interest in the Malden avenue property; that August 27, 1925, she conveyed her property and paid the \$8,162.04 to defendant, who did not nor would not convey to her the one quarter interest in the Malden avenue property, but did give her a certificate for 125 shares of capital stock of the Malden avenue Building Corporation, which stock he falsely and fraudulently represented to her was a one quarter interest in the real estate; and that she discovered thereafter such stock did not represent a one quarter interest in the real estate. The other five counts contained averments to substantially the same effect, concluding with an allegation that plaintiff had been damaged to the extent of \$30,000.

Defendant filed a plea of not guilty to the declaration.

Plaintiff, the only witness on the trial, testified that she and defendant, and his wife, had been friends for fourteen or fifteen years and had visited back and forth to the home of each other; that August 26, 1925, defendant called at her residence and told her he had made a contract to purchase and was about to acquire a piece of property on Malden avenue valued at about \$200,000; that he was short \$20,000 of the purchase price and that it was a very good piece of property; that it had a first mortgage on it for \$115,000, and a second mortgage of \$30,000; that it was leased November 28, 1914, to Grace Feuchtwanger (also known as Mrs. Fisher) and Stephen Luczak, under a valid written lease for a term of ten years at \$22,000 a year; that no concessions had been made to the tenants under the lease; that she asked defendant if it was a good lease and he stated to her that he and Mr. Jarrett, his attorney, had thoroughly examined and investigated the lease and found it to be a valid lease with responsible tenants who paid





their rent monthly; that the tenants owned the furniture in the building, valued at \$22,000; that the rent was to be paid monthly; and that defendant made her an offer in writing to sell her a one quarter interest in the property for \$20,000, which offer was as follows:

"Chicago, Illinois,

August 26th, 1925.

"I will give you one-quarter interest in the building at #4515 (4715) & 4517 (4717) Malden Avenue, Chicago, for the sum of Twenty Thousand Dollars, the building is mortgaged by a first of \$115,000.00 and a 2nd mortgage of Thirty Thousand Dollars.

{Signed} J. S. McGraw"

Plaintiff further testified that defendant requested her to visit and inspect the property with him; that on the same day she accompanied him to the property, where he introduced her to Mrs. Fisher, and the three of them went through various apartments of the building and examined the furniture, and that she was afforded an opportunity of inquiring personally as to the truth of the statements made to her by defendant concerning the lease; that she advised defendant that the proposition looked good to her, but that she did not have \$20,000 cash; that she told him that she had property in Detroit, Michigan, and Windsor, Ontario, which she would convey to him as part of the consideration if that was acceptable to him; that she and defendant, and his wife, went to Detroit, Michigan, and Windsor, Ontario, where the properties were investigated and that thereafter she conveyed those properties to defendant as part of such consideration after their respective values had been agreed upon; that, upon their return to Chicago, plaintiff paid defendant \$8,162.94, the balance of the \$20,000 consideration for her one quarter interest in the Malden avenue property; that August 29, 1925, defendant and his lawyer delivered to her a certificate of stock for 125 shares of the capital stock of the Malden Avenue Building Corporation, which had been incorporated with a capitalization of 500 shares of stock





at \$100 par value each to take title to the property; that she told defendant and his lawyer she expected to receive a deed representing her interest in the property, but that she accepted the certificate for one quarter of the capital stock of the corporation.

Plaintiff also testified that shortly after the deal was closed, and about the time she expected to receive some money from the Malden avenue building, she was advised by defendant that he had just been informed, for the first time, by Mrs. Fisher, the tenant, that the purported lease of the building was fraudulent and that Stut, who owned and sold the property to defendant, had induced Mrs. Fisher to enter into the lease so that the property might be sold at a higher price, and that Mrs. Fisher did not own the furniture at all; and that defendant also informed plaintiff that Mrs. Fisher told him the lessees had a private arrangement with Stut to pay no rent, that they had paid no rent and were not in a financial position to pay rent.

It appeared, on cross-examination, that when plaintiff visited the premises with defendant and met Mrs. Fisher she asked no questions about the lease. In response to a question addressed to her by the court, as to whether or not she discussed any business concerning the property or the lease with Mrs. Fisher, she answered "no," and when the court asked "why," plaintiff stated, "I had no object in talking to Mrs. Fisher." Plaintiff was then examined by the court as follows:

"Q. But you were buying some property from her?

A. Yes, I took Mr. McGraw's word.

Q. But you could have inquired about the lease and everything concerned about it?

A. Yes.

Q. Nothing prevented you from doing it?

A. No."

It further appeared that on this visit plaintiff examined the furniture but did not ask who owned it, that plaintiff was familiar with its

at 1200 you value each in value 1000 to the property and the  
said defendant and his lawyer who appeared to receive a check  
representing her interest in the property, but that she assigned  
the certificate for the amount of the capital stock of the  
corporation.

Witness also testified that shortly after the trial  
was closed, and about the time she expected to receive some  
money from the Nelson estate, she was advised by  
defendant that he had just been informed, for the first time,  
by Mrs. Fisher, the tenant, that the purported issue of the  
building was fraudulent and that that, she would and would the  
property to defendant, and defendant was then in order with the  
issue so that the property might be sold at a higher price, and  
that Mrs. Fisher did not own the building as she had said  
defendant also informed plaintiff that Mrs. Fisher told him the  
defendant had a private arrangement with that to say no more, that  
they had paid no rent and were not in a financial position to pay  
rent.

It appeared, on cross-examination, that when plaintiff  
visited the premises with defendant and not Mrs. Fisher she asked  
no questions about the issue. In response to a question whether  
he had by the court as he wanted to see the defendant and defendant  
concerning the property in the issue with Mrs. Fisher, she answered  
"Yes," and when the court asked "Why," plaintiff stated "I had no  
object in talking to Mrs. Fisher." Witness was then examined

by the court as follows:

- Q. Did you ever borrow money from Mrs. Fisher?
- A. Yes, I did.
- Q. How much money did you borrow from Mrs. Fisher?
- A. I don't know.
- Q. Did you ever borrow money from Mrs. Fisher?
- A. Yes, I did.
- Q. How much money did you borrow from Mrs. Fisher?
- A. I don't know.

It further appeared that on this date plaintiff examined the books



value, stating that in her opinion it was very good furniture and suitable for such an apartment building.

It also developed, on cross-examination, that after defendant advised plaintiff that he had found out the lease was fraudulent, and that the tenant had been induced to enter into it by Stat for the purpose of selling the building at an enhanced price, and that the furniture Mrs. Fisher was supposed to own was not owned by her, and although he had been advised by his lawyer that the lease was in proper form and told by Stat and the tenants that it was a valid lease, it turned out to have been fraudulently executed, and that he did not know this at the time of his transaction with her and that nobody could have ascertained the truth about it at that time, plaintiff then said to defendant, "go ahead and use your own judgment and get the people out if you can."

It also appeared that defendant told plaintiff, shortly thereafter, that he had caused Stat's arrest and was prosecuting him for fraud and obtaining money under false pretenses, and that thereafter defendant kept her advised of the progress of the various matters relating to the lease and the title to the property, and that he was trying to straighten out the tangle caused by the fraudulent lease and false representations made to him by Stat.

At the conclusion of her testimony plaintiff offered in evidence a certain declaration, a bill of complaint, another bill of complaint, an amended bill of complaint, an answer, a plea and still another bill of complaint. These pleadings had been filed in various causes, by or in behalf of McGraw as an interested party, on one side or the other, in an attempt to secure redress against Stat for his fraudulent conduct in the sale of the Malden avenue property to him.

The trial court sustained objections to the admission



value, which is in her opinion is very much diminished  
and suitable for such an important building.

It is also stated, in the same opinion, that after

testimony received by the jury that the house was  
destroyed, and that the house had been burned to the ground  
it is by the purpose of selling the building as an abandoned  
house, and that the testimony that the house was supposed to have been  
not owned by her, and although he had been advised by his lawyer  
that the house was in proper form and sold by her and the friends  
that it was a valid house, it turned out to have been fraudulently  
conveyed, and that he did not know this at the time of his transfer  
action with her and that nobody would have ascertained the truth  
about it at that time, especially from what is contained in the record  
and the fact that judgment and the people are in the way.

It is also suggested that the testimony of the witness, who is

testimony, that he was aware that the house was not destroyed

and that the house was destroyed many years before the transfer, and that

thereafter testimony had been obtained at the program of the various  
matters relating to the house and the title to the property, and that

he was trying to establish and the people around by the testimony

and the testimony of the witness who is the only one.

At the conclusion of the testimony especially offered in

evidence to certain questions, a bill of complaint, another bill

of complaint, or another bill of complaint, or another bill of complaint

still another bill of complaint. These proceedings had been filed in

various courts, by the order of the court as an interested party,

as was also in the case. It is alleged in certain other matters

that the testimony of the witness is the only one of the witness

property to him.

The trial court sustained objections to the admission

of these pleadings. We do not deem it necessary to discuss the theory on which the court acted, or the propriety or correctness of his ruling, inasmuch as these documents appear fully in the record, have been carefully examined by us and have received our consideration to the same extent as if they had been admitted in evidence.

Plaintiff contends that all of these offered pleadings, excluded by the trial court, contained admissions by defendant that are competent and relevant to this cause, and we, therefore, set forth in substance the pertinent allegations of one of them, as amended bill of complaint filed by Jeremiah F. McGraw, and his wife, against Stut et al., in the Superior court, June 23, 1928, as follows:

"Complainants represent that on July 1, 1925, they owned certain Wisconsin property; that the defendant, Stut, owned the property known as 4715 Malden Street, Chicago; that Stut represented to orators that the Malden Street property was worth in excess of \$210,000 and was leased by a written lease to Feuchtwanger and Stephen Luczak at a yearly rental of \$22,000; that the tenants were financially responsible; had paid their rent according to the lease from November 28, 1924, to September 1, 1925; that no concessions had been made to said tenants, all of which representations were false and were known by Stut to be false, and were made for the purpose of inducing orators to exchange their Wisconsin property and execute and deliver their note for \$4,000 for the Malden Street property; that after the exchange orators discovered that the lease aforesaid was made for the purpose of having the building occupied that it might be sold; that the lessees were in said building as agents of Stut; that they had paid no rent under said lease from November 28, 1924, to March 15, 1925; that from March 15, 1925, to September 1, 1925, they had paid to Stut the net income from said building, less operating expenses; that instead of said property being worth \$210,000, it was worth not to exceed \$150,000."

The allegations of this amended bill are typical of the allegations as to Stut's fraudulent representations to McGraw, contained in all of the pleadings offered in evidence, and we fail to discern what possible weight or force they add to the uncontradicted, undisputed evidence of plaintiff already in the record to practically the same effect.





It is not contended, nor even intimated, there was any intention on the part of defendant to either deceive or defraud plaintiff.

Inasmuch as plaintiff testified that the valuation of \$209,000 placed upon the property by defendant was merely his opinion as to its value, and that no agreement was made by defendant to give her anything representing her one quarter interest in the property except the certificate for 125 shares of stock in the building corporation, which she accepted, it is unnecessary to discuss either of these matters.

Plaintiff's major contention is that defendant had not thoroughly investigated the lease in question but relied solely upon Stut's representations to him, which subsequently proved to be false, and that his lack of knowledge of the facts, which he stated to her, concerning the lease, established scienter in him, and therefore rendered him liable for damages resulting to her by reason of the transaction.

Defendant's theory is that there was properly no ground disclosed by the facts presented for an action of fraud and deceit, and that the basic elements vital to such an action were not shown.

Plaintiff insists that the various pleadings filed in other causes by defendant, and offered in evidence by her, show that defendant relied solely upon Stut's statements to him as to the validity of the lease and the occupancy of the premises, and that defendant was not warranted in making the statements which he made to plaintiff, based only on Stut's statements, but should have made a fuller and further investigation. It is sufficient answer to state that these pleadings disclose that false statements were made to him by Stut and that he relied upon them, but there is nothing in any of these proffered pleadings that indicates

Examination on the part of defendant is either positive or negative

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to give her anything representing her own proper interest in the

approximately 1940, the weather was very hot and the water was very hot.

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4. *Journal of the American Statistical Association*, 92(439), 1009-1017.

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10-10-68

work, and the results are shown in the following table:

we will be able to show that the function  $f$  is not constant on any interval of length  $\epsilon$ .

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

we made a notice and posted investigation. It is confidential.

There is also a small section of the river which is not navigable.

more letters of said bus fare and all of them are

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that his investigation was limited to statements made by Stat or that he relied upon them exclusively.

To maintain an action for fraud and deceit it is generally recognized that the evidence must show the representations were made; that they were false, and known to have been false by the party making them, and made to deceive the other party, or made as positive assertions, recklessly, without knowledge of their truth; that the other party believed them to be true; that the person making the purchase, or entering into the contract, relied upon the representations and was induced to act because of them; and that he suffered damage thereby.

The determining question presented on this appeal is whether scienter has been established in defendant by the facts appearing in the record in this cause.

Plaintiff's testimony was to the effect that defendant told her he had examined the property, lease and furniture, interviewed the tenants and had his lawyer examine and investigate the lease, and as a result of their combined examinations and investigations he concluded the lease was valid, contained no concessions, was for ten years at an annual rental of \$22,000, that the tenants paid their rent each month and that the furniture in the building was owned by the lessees and was worth \$22,000. The pleadings heretofore referred to simply disclose that Stat exhibited the lease to defendant and made the same statements concerning the lease, furniture and occupancy of the building as above enumerated to defendant, and that they were false and he relied upon them.

Defendant did not make the statements to plaintiff as of matters within his own knowledge, and it must have been just as apparent to her, as it is to us, that he was merely relating to her his belief or opinion formed as a result of the examination of the



that his investigation was limited to statements made by him or that he relied upon them exclusively.

To maintain an action for fraud and deceit it is generally recognized that the evidence must show the representations were made that they were false, and known to have been false by the party making them, and made to deceive the other party, or made as a positive statement, recklessly without knowledge of their truth and the other party believed them to be true; that the person making the statement, or entering into the contract, relied upon the representation and was induced to act because of them; and that he suffered damage thereby.

The Government's position presented on this point is that the evidence has been established in evidence by the facts appearing in the record in this case.

Alaith's testimony was to the effect that defendant told her he had examined the property, house and furniture, furnished the contents and had his lawyer examine and investigate the house, and as a result of their combined examination and investigation he concluded the house was worth \$25,000, estimated, was for sale at an amount equal to \$25,000, that the contents held their own worth and that the furniture in the building was owned by the house and was worth \$15,000. The findings presented relative to the value of the house and contents are sufficient to establish the facts in evidence and make the same substantial evidence of the facts. Defendant's testimony at the hearing on the motion for judgment, and that they were false and he relied

upon them. Defendant did not make the statements in evidence as to the value of the house and contents, and it must have been that he intended to say, as it is so, that he was merely relying on his belief or opinion formed as a result of the examination of the

lease by his lawyer and himself, and their investigation of all available sources of information.

To warrant an action for deceit it is universally held that false representations must have been knowingly made with an intent to deceive. It is conceded by plaintiff that the statements made to her by defendant concerning the lease were not made with knowledge of their falsity, and were not made with any actual intent to cheat or defraud her. However, it is urged that an intent to deceive will be imputed to one who makes positive and unqualified assertions, recklessly, without knowledge of their truth for the purpose of inducing another to act on them. To bring this cause within this latter rule it would not only be necessary to show that defendant falsely stated as true that of which he had no knowledge, but it would be incumbent on plaintiff to show further that he so represented the matters as to induce in her mind a belief he was speaking from actual knowledge of the matters represented. The evidence clearly demonstrates that such was not the fact. He acted throughout as an honest man and was himself misled by the deceit of Stut, who was guilty of the only fraud discernible on this record. Defendant explored every source of information available, seeking the truth as to the lease and the condition of this property, and we are satisfied that plaintiff was fully advised that his statements to her were based entirely on his investigation.

It is true that plaintiff invested in this property at defendant's solicitation. It is also true that statements made by defendant to her concerning the lease were false. That these statements were false was not discovered by either of them until shortly after the deal was closed. That the fraudulent character of the lease affected injuriously the value of the property is not open to question. That the fraud and deceit of Stut resulted in

known by his family and himself, and their investigation of all

available sources of information.

It was found on review for cause it is not reasonably probable

that false representations would have been knowingly made with an

intent to defraud. It is concluded by majority that the evidence

shows that the defendant was not by defendant's testimony the same man who made

with knowledge of their falsity, and were not made with any intent

to defraud. However, it is urged that an

intent to defraud will be imputed to one who makes a false and

untrue statement, especially, without knowledge of its

truth for the purpose of inducing another to act on them. To bring

this case within this latter rule it would not only be necessary to

show that defendant falsely stated an exact date at which he had no

knowledge, but it would be incumbent on plaintiff to show further

that he so represented the matter as to induce in her mind a belief

he was speaking from actual knowledge of the matter represented.

The evidence clearly demonstrated that such was not the fact. He

acted throughout as an honest man and one sincerely misled by the

deeds of others, who was guilty of the only crime discernible in this

case, to believe and act on the basis of information available

concerning the truth as to the issue and the condition of the property.

and we are satisfied that plaintiff was fairly misled that his conduct

was not with intent to defraud.

It is not that plaintiff intended to lose property as

defendant's intention. It is also true that defendant made

by defendant in her testimony the issue was false. The issue

was made true and was discovered by others at that time.

plaintiff acted in good faith. The defendant's intention

of the issue created especially the issue of the property is not

open to question. That the issue was made at that time is



damage to plaintiff, as well as defendant, is conceded. But was defendant's conduct such as rendered him liable under the law to answer in damages to plaintiff?

The representations made by defendant to plaintiff did not purport to be within his personal knowledge and he did not assume to so state them. He not only advised plaintiff that the information related to her by him was gained as a result of his investigation, but he invited her to inspect the premises and the furniture, and accompanied her on such inspection when he introduced her to the tenant and afforded her an opportunity to test or verify the information he had theretofore received and imparted to her. Plaintiff was a woman of at least some experience in real estate transactions and the management of property, and testified she was familiar with the usual methods of valuing real estate. While it is true that she was purchasing an interest in the property immediately from defendant, the concern of herself and defendant as to the value and other attributes of the property was essentially the same. She was offered the same opportunity to examine the premises and lease as defendant. The law requires individuals, in their dealings with each other, to exercise proper vigilance and apply their attention to those particulars which are in reach of their observation and judgment, and not close their eyes to the means of information accessible to them. (Beckford Inn. Co. v. Ward, 22 Ill. App. 19, 23.)

That defendant and his lawyer were lied to and imposed upon cannot detract from his endeavor to deal honestly with plaintiff. That his statements to her turned out to be false cannot change their character from honest opinions based on an honest investigation with absolutely no suggestion of knowledge on his part of their falsity. How can there be any basis for an action

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of fraud and deceit in the absence of the essential element of scienter? To hold defendant guilty of fraud and deceit under the facts disclosed would be unwarranted by any authority which has come under our knowledge or observation.

The rule as to the essential elements of an action for fraud and deceit is succinctly stated in Endsley v. Johns, 120 Ill. 468, 479, as follows:

"The ground of action is fraud and damage. There must be a scienter, a misrepresentation, and a consequent loss. Fraud includes an intention to deceive. If there is no such intention, the party honestly giving his own opinion, believing he is stating the truth, is not liable, though the statement be wholly untrue. Where, however, he knowingly states what is untrue, a fraudulent purpose must be inferred; and when the statement relates to the matter inquired of, and being relied on necessarily brings damage to the person so misled, he having no knowledge of its untruth, the action will lie."

In Hillstrom v. The Triple Tread Tire Co., 220 Ill. app. 551, 552,

in discussing the question of scienter, the court used this language:

"A representation to constitute the basis of an action for fraud and deceit must not only be false and known to be false by the person making it or, made as a positive assertion recklessly without any knowledge as to its truth, but the person to whom it is made must believe it to be true, and rely upon it, and be induced by such reliance to enter into the contract or make the purchase in question. Merwin v. Arbuckle, 81 Ill. 501; Wachsmuth v. Martini, 154 Ill. 515."

This is not a case where statements were made by defendant under special circumstances imposing a duty on him to know the truth. The sources of his information were equally available to her. She was interested in the purchase of the property, as well as he, and if she saw fit to place her trust in the result of his investigation and that proved to be false and erroneous, through no fault of his, the law will not relieve her from her own want of ordinary prudence. On the other hand, it may well be that even the most searching investigation on her part would, in all probability, have been no more availing against the machinations of Stut.

After full consideration of all the evidence, including the pleadings filed in other causes which were offered in evidence



of time and detail in the absence of the essential elements of  
adversity. To hold defendant guilty of fraud and deceit under  
 the facts disclosed would be unwarranted by any authority which  
 has come under our knowledge or observation.

The rule as to the essential elements of an action for  
 fraud and deceit is succinctly stated in Wheeler v. Johnson, 100 Ill.

482, 483, as follows:

"The ground of action is fraud and deceit. There must  
 be a fraudulent misrepresentation, and a consequent loss. The  
 intention to defraud is essential. It must be the intent to  
 induce the party to part with his property, and to do so by  
 the use of false statements. The statement must be made  
 with knowledge of its falsity, or with a conscious  
 belief that it is false. The statement must be made  
 with intent to induce the party to part with his property,  
 and to do so by the use of false statements. The statement  
 must be made with knowledge of its falsity, or with a  
 conscious belief that it is false. The statement must be  
 made with intent to induce the party to part with his  
 property, and to do so by the use of false statements."

In Wheeler v. Johnson, 100 Ill. 482, 483, 484.

is stated in the opinion of the court, and the court said this language  
 is a representation to constitute the basis of an action for  
 fraud and deceit, and that the intent to defraud is essential  
 to the action. It is not enough that the statement is made  
 with knowledge of its falsity, or with a conscious belief  
 that it is false. The statement must be made with intent  
 to induce the party to part with his property, and to do so  
 by the use of false statements. The statement must be made  
 with knowledge of its falsity, or with a conscious belief  
 that it is false. The statement must be made with intent  
 to induce the party to part with his property, and to do so  
 by the use of false statements."

This is not a case where statements were made by defendant  
 under special circumstances inducing a duty on him to know the truth.  
 The nature of his statements was equally available to her. The  
 interest in the purchase of the property, as well as he, and it  
 was his to place her trust in the result of his investigation and that  
 proved to be false and erroneous, through no fault of hers. The law  
 will not relieve her from her own want of ordinary prudence. On the  
 other hand, it may well be that even the most searching investigation  
 we now have would, in all probability, have been no more availing  
 against the machinations of fraud.

After full consideration of all the evidence, including  
 the questions filed in other cases which were offered in evidence

but excluded by the trial court, and all reasonable inferences that might be drawn therefrom, we are of the opinion that there was no evidence in the record tending to prove the essential allegation of scienter, and it was clearly the duty of the trial court to direct a verdict for defendant.

It is a rule too well established to require citation of authorities that, if the evidence and the reasonable inferences which may be drawn therefrom do not tend to prove one or more material averments of the declaration, it is not error to give a peremptory instruction. (Piper v. Green, 218 Ill. App. 590, 595.)

Other points have been urged, but in the view we take of this cause we deem it unnecessary to discuss them.

For the reasons indicated the judgment of the Superior court is affirmed.

APPEALS.

Gridley and Scanlan, JJ., concur.





36770

FLORENCE B. MCGINLEY, also  
Known as Mrs. James R.  
McGinley,

Appellee,

v.

THE CORPORATION OF THE ROYAL  
EXCHANGE ASSURANCE,  
Appellant.

APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

274 I.A. 653

MR. JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit, commenced March 6, 1930, based upon defendant's policy issued January 13, 1929, and insuring plaintiff against loss of six pieces of jewelry of the total specified value of \$4,050, there was a trial before a jury in March, 1933, resulting in a verdict and judgment against defendant for \$3050. The present appeal followed.

Plaintiff's declaration consisted of two special counts of substantially the same allegations. A copy of the policy is set forth in haec verba, wherein <sup>it</sup> is stated, inter alia, that the amount insured is \$4050; that the premium is \$101.25; that the Corporation, "by this policy of insurance, does hereby insure Mrs. James R. McGinley, whose address is 19 E. Cedar St., Chicago, loss if any payable to assured, for the sum of \$4050, on jewelry, from January 13, 1929, at noon until January 13, 1936, at noon;" and that "this policy covers on jewelry \* \* as per schedule attached, in all situations, against all risks or loss or damage arising from any cause whatsoever, except as hereinafter provided." Among the provisions or exceptions is the provision: "Warranted that the assured is not engaged in or in any way connected with any form

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of professional entertaining." Attached to the policy is a schedule or rider, describing the six pieces of jewelry and stating their respective values, - one of which is described as a ladies' diamond ring of the value of \$1000. In the first count of the declaration, after stating the execution and delivery of the policy, etc., plaintiff alleged that on March 11, 1929, certain of the jewelry so insured (all except said ring valued at \$1000) "was stolen, taken and carried away from the premises of plaintiff," of the value of \$3050; that forthwith after the happening of the loss she gave notice thereof to defendant, and within three months she presented to it her claim therefor, etc.; and that although she has kept and performed all things in the policy contained on her part to be kept and performed, and although she has sustained the loss, yet defendant after numerous requests has refused to pay to her the amount of the loss, etc.

To the declaration defendant filed a plea of the general issue and three special pleas, viz., special plea No. 1, as amended, and special pleas Nos. 2 and 3. The court sustained plaintiff's demurrer to special plea No. 3, and before trial plaintiff filed replications to the others. In special plea No. 1, as amended, defendant alleged that plaintiff, for the purpose of procuring the issuance of the policy, on or about January 10, 1929, presented to it a written application therefor (copy of application set out in full), and also a schedule of the jewelry substantially the same as set forth in the policy; that in the application she made the representations and statements as therein mentioned; and that defendant, believing the same to be true and relying upon them, issued and delivered the policy. And defendant further alleged in substance:



of professional engineering. Attached to the policy is a schedule or rider, describing the six pieces of jewelry and stating their respective values - one of which is described as a ladies' diamond ring of the value of \$1000. In the first count of the declaration, after stating the execution and delivery of the policy, plaintiff alleged that on March 11, 1933, certain of the jewelry so insured (all except said ring valued at \$1000) were stolen, taken and carried away from the premises of plaintiff, of the value of \$1000; that thereafter after the happening of the loss she gave notice thereof to defendant, and within three months she presented to it her claim therefor, etc.; and that although she has kept and retained all things in the policy contained on her part to be kept and retained, and although she has maintained the loss, yet defendant after numerous requests has refused to pay to her the amount of the loss, etc.

To the declaration defendant filed a plea of the general issue and three special pleas, to-wit: special plea No. 1, an amendment and special plea Nos. 2 and 3. The court sustained plaintiff's demurrer to special plea No. 3, and before trial plaintiff filed motions to the effect, in special plea No. 1, as amended, defendant alleged that plaintiff, for the purpose of procuring the payment of the policy, on or about January 10, 1933, presented to it a written application therefor (copy of application not set in full), and also a certificate of the jewelry described in the same as set forth in the policy; that in the application she made the representations and statements as therein mentioned; and that defendant, believing the same to be true and relying upon them issued and delivered the policy. The defendant further alleged

That in said application plaintiff knowingly and falsely stated that she was residing with her husband, one James R. McKinley, at No. 19 East Cedar street, Chicago, that he was an executive, that the name of his employer was the West Penn Steel Co. of Tarentum, Pa., and that she was not a public entertainer; that all of said statements were made for the purpose of deceiving and did deceive it; that in truth and in fact plaintiff was not residing with James R. McKinley at said place, that he was not an executive of said Steel Co., that she was a public entertainer living separate and apart from him, and at said 19 East Cedar street, Chicago, was conducting "a place for the connection and sale of alcoholic beverages, consisting of whiskey, gin, beer and other alcoholic concoctions and otherwise entertaining and amusing those who desired to call;" that all of these facts plaintiff well knew, and that defendant, relying upon the statements in said application issued said policy, which "had it been advised of the true facts, it would not have issued;" that it did not become advised of the true facts until on or about April 11, 1939; that it then "elected to rescind and cancel said policy;" and that it then at Waukegan, Illinois, in the county jail in that city, where plaintiff then was, tendered to her written notice of its election to rescind and cancel the policy, and also tendered to her the sum of \$101.25, in lawful money, being the amount of premium which she had paid on the policy, and which said sum defendant now here tenders in court.

In special plea No. 2, containing similar allegations, it is charged that in her application for the policy plaintiff falsely represented that she was residing with said James R. McKinley as his wife at said 19 East Cedar street, that she "was not engaged in any business, mercantile or professional pursuits, and that her duties were those of housewife," well knowing said representations to be false and untrue; that in truth and in fact she was not then and there residing with said McKinley, or there performing the duties of a housewife, but on the contrary "was engaged in manufacturing, purchasing, buying and selling whiskey, gin, beer and alcohol, \* \* and in the maintaining and operating of a house for the sale and distribution of alcoholic liquors;" and that had defendant been advised of the true facts it would not have issued the policy in question.

On the trial the policy, plaintiff's written application therefor (which contained the representations substantially as stated in the pleas), and certain other writings were introduced in evidence. Plaintiff was her principal witness and she was cross-examined







at considerable length. In our opinion her cross examination was unduly and improperly limited by the court as to certain matters bearing upon the defenses as contained in defendant's said pleas. For defendant Peter M. Schoenberg and Charles F. Martin, insurance adjusters, testified at length as to certain investigations made by them, and as to certain conversations they had with plaintiff and others after plaintiff had made claim for loss under the policy. A. C. Willard, an Inspector for the United States at Chicago, testified that he knew plaintiff "but not by the name of Medinley," that "she said her name was Florence Keen," and that the first time he saw her "was on November 24, 1928, at No. 316 Cass street, Chicago." He was then asked to "describe the premises at 316 Cass street," but upon objection was not allowed by the court to answer the question. Thereupon, the jury being temporarily excused, defendant's attorney offered to prove by the witness the following facts in substance: That the premises at 316 Cass street consisted of a one and one-half story brick building; that in the basement thereof were a number of small tables with four chairs around each table; that on November 24, 1928, the witness, as a representative of the United States Revenue Department, made a raid on the premises and took therefrom and confiscated large amounts of intoxicating liquors, consisting of whiskey, gin, alcohol, spirits, Canadian ale, etc.; also large numbers of liquor stamps, whiskey and gin labels, and numerous bottles and other labels; that at the time of the raid plaintiff, in the presence of the witness, "stated that she was the proprietor and had been in this business at said location for one and a half years, and that she made all of her liquor out of alcohol, water and essence;" and that at the time and place of the raid plaintiff was arrested as Florence Keen, and taken to the Federal court in Chicago. Thereupon defendant's attorney presented and





offered in evidence a certified copy of the record of certain criminal proceedings against plaintiff, under the name of Florence Skeen, had in the United States District Court at Chicago, for violations by her on November 24, 1928, of the National Prohibition Act, including the information (sworn to on January 21, 1929; i.e., three days after the policy in question was issued), certain subsequent proceedings, and the judgment of her conviction on April 8, 1929, wherein she was sentenced to imprisonment in the county jail at Waukegan, Illinois, for one year and to pay a fine of \$250, etc. But the court, upon objection, refused to allow the offered testimony of the witness, R. G. Willard, to be admitted in evidence before the jury, and also refused admission in evidence of the certified copy of said record.

Harold E. Angell, defendant's witness and manager of its Chicago office, after testifying that defendant in issuing policies insuring against losses on jewelry is governed by certain general rules, was not allowed by the court, upon objection made by plaintiff's attorney, to state what the rule was where it appeared to the company that the applicant was engaged in the manufacture and sale of alcoholic liquors. Defendant's counsel offered to show by the witness that the company's underwriting rule was that, where it was disclosed from the application or otherwise that the applicant was engaged in the manufacture or sale of such liquors, a policy could not be issued. The court, in sustaining plaintiff's objection to the offered testimony, stated in the jury's presence: "I think there is no evidence here that she sold alcoholic liquors," and "I think any rule with reference to that must be in the policy itself."

After a careful consideration of all the admitted evidence, including the testimony of plaintiff, and of the rulings of the





court against the admission of certain evidence offered by defendant, we have reached the conclusion that the interests of justice will be best served by a reversal of the judgment and the remandment of the cause for another trial. The gist of defendant's defense is that plaintiff, by concealing the fact in her application of her being or having recently been engaged in a business prohibited by law, committed a fraud upon defendant, whereby it was induced to issue the policy, which it would not have issued, because of the increased risk, had it been advised of or had it known the true fact. (See Hancock v. Knights of Security, 303 Ill. 66, 71; Phelps v. Hazworthy, 226 Ill. 254, 260; Calligard v. Midland Casualty Co., 247 N. W. Rep. (11a.) 846, 848; Elliot v. Frankfort, etc. Ins. Co., 172 Calif. 261, 267; Park v. Fidelity & Casualty Co., 279 N. W. Rep. (St. Louis, Mo., Court of App.) 246, 247; Reese v. Fidelity & Deposit Co., 156 N. Y. Supp. 408, 410.) And we are of the opinion that, because of the court's rulings rejecting certain of defendant's offered evidence and limiting plaintiff's cross-examination, defendant was unable to properly present its said defense to the jury.

The judgment appealed from is reversed and the cause is remanded.

REVERSED AND REMANDED.

Sullivan, P. J., and Scanlan, J., concur.





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H. J. GRIGOLETT CO.,  
an Illinois corporation,  
Complainant and Appellant,

v.

THE GRIGOLETT CO., an Illinois  
corporation, HENRY J. GRIGOLETT,  
ELINOR R. BAKER, FREDERICK A.  
BANGS and ESTELLE J. BALDWIN,  
Defendants and Appellees.

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274 I.A. 653<sup>2</sup>

APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal complainant seeks to reverse an order or decree of the circuit court of Cook county, entered March 1, 1933, sustaining the general demurrer of the five above named defendants to its second amended bill of complaint, filed March 28, 1932, and dismissing that bill for want of equity.

By complainant's original bill, filed September 9, 1930, it prayed for an injunction, a discovery and an accounting. In addition to the five defendants four other parties were made defendants, including the Reynolds Spring Co., a Delaware corporation and doing business at Jackson, Michigan, but, apparently, none of these four other parties was served with process or entered an appearance. During December, 1930, the general and special demurrer of the five defendants to the original bill was sustained. Thereafter complainant filed certain amendments, and during January, 1932, said defendants' general and special demurrer to said bill as amended was sustained, and complainant obtained leave to file and filed said second amended bill, in which the allegations are in substance as follows:

1st. That on and for several years prior to September





1. 1925, Henry J. Grigolet (the principal defendant and herein-after called Grigolet) was a mechanical engineer of recognized ability; was also an inventor of new and useful devices for the successful molding of phenolic products, such as "bakelite;" was also an expert engineer in the designing and developing of hydraulic presses and other devices for the molding of such products; was also engaged in furnishing advice and engineering skill to manufacturers in this art, which was a new and rapidly expanding one; was also engaged in Chicago in the business of manufacturing and selling hydraulic presses, apparatus for press control and other machinery for the molding of said products, under the name and style of "H. J. Grigolet and Associates;" and was also engaged in performing services as an engineer for the Kellogg Switch Board & Supply Co., a corporation.

2nd. That prior to September 1, 1925, Grigolet had been giving advice to the Reynolds Spring Co., which operated a molding plant at Jackson, Michigan, and which had great confidence in him, and which was possessed of large cash resources.

3rd. That about September 1, 1925 certain officers of that company informed him that the company would consider a purchase by it of the assets of "H. J. Grigolet and Associates," all of the "Grigolet patents," and "his exclusive services as an engineer, designer, inventor and expert for a period of 5 years, including the exclusive right to the name 'Grigolet' as a trade name in connection with the molding of phenolic products and the manufacture of presses, etc. for such moldings;" that negotiations were had, during which Grigolet "formed the intention to engage in his own behalf in the field of molding bakelite and similar products, but knew that to establish a proper molding plant a capital of about \$100,000 was necessary and that he was without resources or capital;" that, thereupon, Grigolet, with others, including Elmer E. Baker and Hobart E. Burton, "formed a fraudulent plan or scheme to acquire from the Reynolds Spring Co. sufficient capital so that he might engage in business as a manufacturer, designer and molder in the bakelite trade and under the name of Grigolet;" that they then knew that the entire assets of H. J. Grigolet and Associates were not worth more than \$5,000, but they nevertheless planned to form a corporation with a paid up capital stock of \$100,000, to be paid with said assets which were not worth more than \$5,000; that they further planned that this capital stock of the proposed new corporation would be sold to the Reynolds Spring Co. for \$100,000 and thereby Grigolet would obtain sufficient capital, whereby he could engage, "either on his own behalf or through the instrumentality of another corporation, in the molding of bakelite and other phenolic products for the trade generally," etc.

4th. That prior to October 2, 1925, Grigolet, Baker and Burton, as incorporators, filed an application for the organization in Illinois of complainant corporation - it to have a capital stock of \$100,000, divided into 4,000 shares of the par value of \$25, each; that in the application it is stated that the capital "paid in cash" is \$1,341.27, that the capital "paid in property" is \$98,658.73, that the property is located at No. 2830 West Lake Street, Chicago, and that it consists of "Machinery, equipment, stock, \* \* tools, fixtures, patents and good-will;" and that on October 2, 1925, the Secretary of State of Illinois issued a charter to complainant as a corporation.

5th. That on October 2, 1925, when complainant





corporation was organized, Grigoletti "had no intention of operating it on his own behalf, or of paying it for said stock \$100,000 in cash or in property, but that his sole purpose, as well as that of Baker and Burton, was to enable him (Grigoletti) to sell complainant's capital stock to said Reynolds Spring Co., in order to consummate said fraud."

6th. That in the application to organize complainant as a corporation Grigoletti and Baker and Burton had named themselves as constituting its first board of directors, and that Baker and Burton were agents and employees of Grigoletti and were completely under his dominion and control.

7th. That at the first meeting of complainant's board of directors, held on November 18, 1925, Grigoletti was elected president and Burton vice-president, and Baker secretary and treasurer; that Grigoletti presented a written proposal in which he made various statements as to the assets and condition of the business of H. J. Grigoletti & Associates, of which he was the sole owner; that therein he proposed, in consideration of personally receiving 3,998 shares, fully paid, of the capital stock of complainant, to transfer to it all of the property and business of H. J. Grigoletti & Associates, including all machinery, tools and equipment, all material and stock on hand, two U. S. Letters Patents both issued June 30, 1925, three pending applications made by him and three applications about to be made for other patents, and also moneys on deposit and accounts and bills receivable and also the good will of said business.

8th. That said directors accepted the proposal by resolution passed, in which it was stated that the fair value of all of said property was \$100,000, and that in payment of the same, certification for 3,998 shares of complainant's stock, marked fully paid and non-assessable, be issued to Grigoletti; and that these transactions were all "in pursuance of said fraudulent plan of Grigoletti, Baker and Burton to cheat and defraud complainant and said Reynolds Spring Co."

9th. That said Letters Patents and said applications on file "had no market value;" that H. J. Grigoletti & Associates had no earnings and its good will had no value "except as it was connected with the engineering skill of said Grigoletti;" that said assets, so purported to be conveyed to complainant in exchange for said 3,998 shares of fully paid stock, were not worth \$100,000, and not more than \$5,000, as said directors well knew; and that about November 18, 1925, Grigoletti received and became possessed of said 3,998 shares of fully paid stock.

10th. That on November 23, 1925, at another meeting of the board of directors a resolution was passed to the effect that the transfer of all of said property to complainant, in consideration of the issuance of said shares of stock, was also subject to the assumption by complainant of certain obligations and liabilities of Grigoletti, amounting to \$12,440; that said obligations were then and there assumed by complainant; that by said resolution and said assumption complainant "was then and there rendered insolvent;" and that the passage of said resolution was opposed to complainant's best interests and was in further pursuance of said fraudulent plan of Grigoletti, Baker and Burton "to cheat and defraud complainant and said Reynolds Spring Co."



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1. The Commission has received information from the Department of the Interior that the Bureau of Land Management is planning to acquire certain lands in the State of California for the purpose of establishing a national monument. The Commission is of the opinion that the acquisition of such lands is not in the public interest and that the proposed acquisition should be discontinued.

1. The first of these is the fact that the Government has been unable to secure the necessary funds to carry out its policy. This is due to the fact that the Government has been unable to secure the necessary funds to carry out its policy.

1. The first of these is the fact that the Government has not yet decided whether it will accept the offer of the United States to purchase the rights in the patent for the atomic bomb. This decision is of great importance, for if the Government does not accept the offer, the United States will be unable to develop the atomic bomb, and the Government will be unable to protect the United States against the possibility of a nuclear attack.

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11th. That the above action of said board of directors in issuing said stock to Grigolet, for said insufficient consideration, etc., left complainant with insufficient capital to engage in the business for which it was organized.

12th. That about November 18, 1925, Grigolet was in the employ of said Kellogg Switchboard & Supply Co., as a consulting engineer; that his said new inventions were being developed by him "on the time of and at the expense of said Kellogg Co.;" that the prosecution of his pending applications in the U. S. Patent Office was done by patent solicitors employed by said Kellogg Co.; that on November 18, 1925, four applications covering his said inventions were pending in said patent office; and that thereafter three other applications were filed by Grigolet.

13th. That "from November 18, 1925, until April 21, 1926," Grigolet acted as complainant's president, and "thereafter acted as vice-president thereof until August 1, 1927, when he left complainant's employ;" that during said period he was in charge of its affairs and in the prosecution of said patent applications; that "at all times after February 10, 1926" he had the custody and charge of said applications and "was the only person connected with complainant, or with said Reynolds Spring Co., who had any knowledge of said applications, or of the steps to be taken to protect complainant in the securing of claims thereunder or in the procuring of the issuance thereof of valid patents, and that it was his duty to so prosecute said applications that valid patents would issue to complainant;" but that "in pursuance of his said conspiracy and plan to cheat and defraud complainant and said Reynolds Spring Co., and in pursuance of his plan to secure for himself the use of the inventions disclosed in said applications free and clear of the patent monopoly otherwise the property of complainant, and in pursuance of said plan of his, and of that of said Baker and Burton, to establish a business in competition with complainant and said Reynolds Spring Co., under the name and style of 'Grigolet,' and to obtain for his said business when so organized the benefit and advantage of said inventions," said Grigolet "wilfully and intentionally failed to prosecute the said five patent applications within one year after the last official action of said patent office concerning the same;" and that thereby said applications (transferred to complainant in partial consideration for the issuance to Grigolet of said capital stock) "became abandoned and were irretrievably lost to complainant, when it was said Grigolet's duty as such vice-president of complainant to faithfully and diligently prosecute said applications for complainant's benefit."

14th. That prior to September 1, 1925, Grigolet had installed certain of his improved devices in the molding plant of the Reynolds Spring Co. at Jackson, Michigan, and that thereafter he had negotiations with it concerning the sale to it of all the capital stock of complainant.

15th. That thereafter, about December 15, 1925, Grigolet and the Reynolds Spring Co. came to an agreement which, under date of December 22, 1925, at Chicago, was embodied in a certain "Memorandum of Agreement" duly signed by them (copy attached, marked Exhibit A, and made a part of the bill), and which was approved by the directors of said Reynolds Spring Co.





In said copy of the agreement attached to the bill it is stated in the preamble that Grigolet is the owner of complainant company, having its plant at 2830 West Lake street, Chicago; that Grigolet, in addition to operating and managing the company, "is also, personally and on his own account, doing advising or consulting engineering work and receiving pay therefor;" that Grigolet has supplied to the Reynolds Co. a financial statement, showing the accounts receivable and the unfilled orders of complainant company as of December 14, 1925, also a balance sheet dated November 30, 1925, also a list of the U. S. patents and applications for patents belonging to said company; that the Reynolds Co. is engaged in the operation of a welding plant at Jackson, Michigan, and "desires to acquire the entire capital stock of the H. J. Grigolet Co. in order to obtain the full benefits of the patents, inventions, trade marks and good will of said Grigolet and the full benefit of his entire time, services, engineering skill and inventive genius." And, in consideration of one dollar and the mutual covenants herein, Grigolet agreed in substance:

(a) To sell and deliver to the Reynolds Spring Co. \$100,000, face value, of the fully paid capital stock of the H. J. Grigolet Co. (that being its entire authorized and issued stock), and to accept in full payment of the same the sum of \$100,000 in cash; and,

(b) In consideration of 2500 shares of the common stock of the Reynolds Spring Co., to be issued as fully paid and non-assessable, and of a yearly salary of \$12,000, to be paid in semi-monthly payments of \$500 each, on the 15th and last day of each month, "to enter into a firm and binding contract with said H. J. Grigolet Co., or with its successors and assigns (should it be found necessary or desirable to transfer its assets to a corporation chartered in some other State), and to give to said company the benefits of his entire time, service, ability, inventions, trade marks, and patents growing out of said services, and his inventive genius for a period of five years from the date of this agreement;" and

(c) While so employed herein, "to disclose to such person or persons, as the president of the Reynolds Spring Co. may in writing designate, all inventions, designs, trade-marks and developments as he may originate or produce and any such other engineering developments and inventions as may come to his knowledge and which may be of interest or benefit to said H. J.



[illegible]

Grigolet Co. (complainant), its successors and assigns, or to said Reynolds Spring Co., and to sign, seal and deliver any and all papers and agreements which may be deemed necessary or desirable to carry said undertakings into effect, including applications for patents, trade-marks and assignments thereof when and as the same have been mutually agreed upon;" and

(d) Said Grigolet "further agrees, should the same be deemed necessary or advisable by the Reynolds Spring Co., to the removal of said H. J. Grigolet Co. (complainant) from Chicago to Jackson, Michigan, and to the changing of his residence to Jackson, and to use his influence to securing the continuance with said Grigolet Co. of such of its employees as the Reynolds Spring Co. may desire to the moving of said desired employees to Jackson."

And in said agreement the Reynolds Spring Co., in consideration of the mutual covenants, etc., agreed, subject to the approval of its Board of Directors,

"To purchase" from said Grigolet "the entire authorized and issued capital stock of \$100,000" of said H. J. Grigolet Co., and "to pay to said Grigolet therefor the sum of \$100,000 in cash on or before January 15, 1926, and to issue and deliver to said Grigolet 2500 shares of fully paid, non-assessable common capital stock of the Reynolds Spring Co., as a consideration for the signing, sealing and delivery of the five year employment contract above enumerated to be entered into by said Grigolet with the H. J. Grigolet Co. as above set forth, said stock to be delivered and said contract to be executed on or before January 15, 1926. \* \* In the event of the disapproval of this contract by the board of directors of the Reynolds Spring Co., this contract shall be null and void."

It is further alleged in the bill as follows:

16th. That after the signing of said agreement Grigolet and the Reynolds Spring Co. "settled upon a modification of it, wherein and whereby the consideration for the sale of complainant's said stock, and for Grigolet's entering into his said five year employment contract with complainant, was modified, in that the cash consideration to be paid was reduced to \$75,000, and, in lieu of the additional payment of \$25,000 in cash and the 2500 shares of the common stock of the Reynolds Spring Co., (which said stock was then being traded in on the New York stock exchange at a price of about \$10 per share), said Grigolet was to receive 5,000 shares of said stock of the Reynolds Spring Co.; that a memorandum of this supplementary agreement was entered into on December 30, 1925 (copy attached and made a part of the bill); but that said supplementary agreement fails to disclose the fact that the 5,000 shares of the common stock of said Reynolds Spring Co. was to be applied one-half for the consideration for entering into the contract for sale of complainant's capital stock, and one-half as consideration for said Grigolet's entering into a five year employment contract with complainant; that said Grigolet has pretended and is pretending that the supplementary agreement constitutes an abandonment of the five year employment contract called for in the oral agreement (of which the memorandum agreement of December 22, 1925, Exhibit A hereto, is a memorial);







and complainant charges that if any ambiguity exists, it has arisen through the mutual mistake of the Reynolds Spring Co. and Grigoleit in drafting said supplementary agreement, and that it was the intention of the parties thereto at that time that the provision in the agreement of December 22, 1925 (Clause (b) of Exhibit A as hereinabove set forth) should be fully maintained at all times, and was in no way modified by said supplementary agreement of December 30, 1925." And complainant avers that said Grigoleit, in executing both of said agreements, "had no intention of complying with or carrying out any of the provisions thereof, but executed them because such execution was necessary to the consummation of his aforesaid fraudulent plan, and that of Baker and Burton, to cheat and defraud said Reynolds Spring Co. and complainant."

The copy of said supplementary agreement, attached to the bill as Exhibit B, is dated at Jackson, Michigan, December 30, 1925, is signed by Grigoleit, and by the Reynolds Spring Co., by its president, and is in part as follows:

"We, the undersigned, parties to a memoranda of agreement dated at Chicago, Illinois, December 22, 1925, copy of which is hereto attached, herein and hereby agree as follows:

H. J. Grigoleit \* \* herein and hereby agrees to the modification of the said agreement of December 22, 1925, and to accept as full pay for the \$100,000 face value of the capital stock of the H. J. Grigoleit Co., \* \* the sum of \$75,000 in cash and 5,000 shares of the common capital stock of the Reynolds Spring Co., said stock and \$75,000 to be paid on or before January 15, 1926.

The Reynolds Spring Co., \* \* herein and hereby agrees to purchase of said H. J. Grigoleit all of the \$100,000 face value capital stock of the H. J. Grigoleit Co., and to pay therefor the sum of \$75,000 in cash and 5,000 shares of the common capital stock of the Reynolds Spring Co. on or before January 15, 1926.

It is mutually agreed by and between the parties hereto that the Reynolds Spring Co. will proceed diligently to a further examination of the patent situation described in the memoranda agreement hereto attached, and to complete said examination on or before January 15, 1926, and the said H. J. Grigoleit will offer full access to the said patent records and to the records of the corporation of the H. J. Grigoleit Co. in order that the Reynolds Spring Co. may be assured of the representations made in the said memoranda of agreement and of the scope and validity of the patents and patent applications herein involved. In the event the investigation, above provided for, of the patents, applications and records are not satisfactory then this agreement shall be of no binding effect. In the event the examination and investigation herein provided for substantiates what appears to be the facts, then the parties hereto are mutually bound and the said payment and deliveries are to be made."

It is further alleged in the bill as follows:

17th. That the consideration for the Reynolds Spring Co.'s entering into the agreement with Grigoleit was his promise to enter into a five year employment contract with complainant and to give complainant his engineering skill and all of his inventions relating to said molding art; that without this promise the Reynolds





Co. would not have paid to him the equivalent of \$100,000 for all the capital stock of complainant; that without the time, labor, services and inventive ability of Grigoletti said stock was not worth \$100,000 to the Reynolds Spring Co.; and that the Reynolds Spring Co. "had no notice or knowledge of the fraudulent nature of the transactions between him and complainant corporation, as above outlined in paragraphs 4th to 10th hereof, but that in purchasing said stock the Reynolds Spring Co. \* \* \* relied upon the representations of Grigoletti with respect thereto."

18th. That on January 15, 1926, the Reynolds Spring Co. delivered to Grigoletti its check for \$75,000 and a certificate for 5,000 shares of its common stock for which he executed and delivered his receipt; that the amount of said check was thereafter received by him; that in and by said receipt "it is not shown that the 2500 shares of the common stock of the Reynolds Spring Co., so delivered, was the consideration of Grigoletti's entering into a five year employment contract with complainant;" that "it was through a mutual mistake and oversight, on the part of the Reynolds Spring Co. and Grigoletti, that this fact was not set forth in said receipt;" that that feature of the agreement between the parties "had not been abandoned but was still in force and effect;" and that at the same time that Grigoletti delivered his said receipt for said check and said 5,000 shares of stock, he transferred and delivered to the Reynolds Spring Co. the 4,000 shares of the capital stock of complainant, "for which said Reynolds Spring Co. executed and delivered to him its receipt." (Copies of both receipts are attached to and made a part of the bill, as Exhibit C.)

The said copies of both receipts, so attached to the bill, read as follows:

\*Chicago, Ill. Jan. 15, 1926.

Received of Reynolds Spring Co. of Jackson, Michigan, check, dated Jan. 15, 1926, #3213 for \$75,000, drawn on the American Trust Company, New York. Also, stock certificate #NYO 5637 for 5,000 shares of common stock, all in full consideration and payment for \$100,000 face value of the capital stock of the H. J. Grigoletti Co., an Illinois corporation; said \$100,000 face value of capital stock being fully paid and non-assessable and constituting the entire authorized capital stock of said H. J. Grigoletti Co., said stock being delivered in accordance with the memoranda of agreement, executed December 22nd, 1925, and supplementary memoranda of agreement signed and delivered December 30, 1925, said memoranda of agreement and supplementary memoranda of agreement being between H. J. Grigoletti and said Reynolds Spring Co.

(Signed) H. J. Grigoletti.

Received of H. J. Grigoletti \$100,000 face value of the capital stock of the H. J. Grigoletti Co., an Illinois corporation, said \$100,000 of capital stock being the entire authorized issue of said Illinois corporation, said capital stock being delivered in consideration for \$75,000 in money represented by check #3213 of our company and certificate NYO-5637 for 5,000 shares of common stock of our company, which stock and check are delivered in accordance with memoranda of agreement between H. J. Grigoletti and our Company, signed Dec. 22nd, 1925 and supplementary memoranda of agreement signed by H. J. Grigoletti and our company, Dec. 30, 1925."



1. The following information was obtained from the records of the Federal Bureau of Investigation, Bureau of Prisons, and the Department of Justice, and is being furnished to you for your information:

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and of Jackson on various days to return him to

*Journal of Management Education* 26(7)

[illegible]

... (normal)

2. The amount of the loan is \$100,000.00. The loan is to be repaid in 10 equal annual payments of \$12,000.00 each, starting on the first day of the first year of the loan. The interest rate is 10% per annum, compounded annually. The first payment is due on the first day of the first year of the loan. The loan is to be repaid in 10 equal annual payments of \$12,000.00 each, starting on the first day of the first year of the loan. The interest rate is 10% per annum, compounded annually. The first payment is due on the first day of the first year of the loan.

It is further alleged in the bill as follows:

19th. That from June, 1924, to January 15, 1926, Grigolet had maintained the plant of said "H. J. Grigolet & Associates" at 2830 West Lake street, Chicago; that one of the conditions of said contract of sale was that complainant's plant should be moved to Jackson, Michigan; that Grigolet requested that the Reynolds Spring Co. grant him some time to wind up his affairs in Chicago and close some personal matters before he began work for complainant and said Reynolds Spring Co.; that for a number of years he had occupied a position as consulting engineer with the Kellogg Switchboard & Supply Co., including the time that he operated the business of "H. J. Grigolet & Associates;" that during the months of January, February, March and April, 1926, "as complainant is informed and believes," Grigolet was employed by said Kellogg Co. "on full time," and "was further acting in the capacity of consulting engineer for other organizations whose names are unknown to complainant;" that "for this reason, the Reynolds Spring Co. did not pay to him the salary of \$1,000 per month" during said four months; and that "because of the understanding aforesaid, Grigolet waived the feature of the contract requiring the Reynolds Spring Co., or complainant, to pay him the salary aforesaid."

20th. That on April 24, 1926, Grigolet notified the Reynolds Spring Co. that he had elected to terminate his said agreement with it because of its breach in not paying his salary for said four months; that his position "was without merit and taken as a step in the consummation of his said fraudulent scheme;" that on May 7, 1926, said company tendered to him four checks for \$1,000 each for his salary for said four months and he accepted all of said checks; that thereafter he continued to work for complainant as its vice-president and general manager and was paid said monthly salary by complainant; that he has claimed, and is claiming, that said contract of December 22, 1925 (Exhibit A) was forfeited and thereafter abandoned because of said supposed breach of the Reynolds Co. in not paying said salary; but that his said claims are without merit and mere attempts "to lay a foundation for a pretext to break said contract, \* \* and enable him to carry out his fraudulent plan aforesaid."

21st. That "thereafter" (time not stated) "complainant and said Reynolds Co." prepared a form of employment contract between Grigolet and complainant "in accordance with said agreement, Exhibit A," and requested him to execute the same, but that he "fraudulently refused to enter into the said five year employment contract with complainant," wrongfully pretending that he was under no contractual obligation to complainant or said Reynolds Co. so to do; and that when he signed said Exhibit A, "he had no intention of complying with its terms," and his signing of the same "was solely as a step in the consummation of his fraud to acquire sufficient capital to engage in the molding trade in competition with complainant and said Reynolds Spring Co."

22nd. That after May 15, 1926, and after complainant's plant had been moved to Jackson, Michigan, and while Grigolet was acting as complainant's vice president and general manager and "ostensibly" performing the duties thereof, he "was devoting his time to organizing a business to compete with complainant and said Reynolds Spring Co. in the manufacture of machinery," etc.; that he, instead of soliciting customers for complainant and said



SECRET OF THE LIFE OF THE HONORABLE JOHN C. CALHOUN

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1. The following information was obtained from the records of the Federal Bureau of Investigation, New York City, New York, dated 10/10/40, and 10/11/40, and 10/12/40, and 10/13/40, and 10/14/40, and 10/15/40, and 10/16/40, and 10/17/40, and 10/18/40, and 10/19/40, and 10/20/40, and 10/21/40, and 10/22/40, and 10/23/40, and 10/24/40, and 10/25/40, and 10/26/40, and 10/27/40, and 10/28/40, and 10/29/40, and 10/30/40, and 10/31/40, and 11/1/40, and 11/2/40, and 11/3/40, and 11/4/40, and 11/5/40, and 11/6/40, and 11/7/40, and 11/8/40, and 11/9/40, and 11/10/40, and 11/11/40, and 11/12/40, and 11/13/40, and 11/14/40, and 11/15/40, and 11/16/40, and 11/17/40, and 11/18/40, and 11/19/40, and 11/20/40, and 11/21/40, and 11/22/40, and 11/23/40, and 11/24/40, and 11/25/40, and 11/26/40, and 11/27/40, and 11/28/40, and 11/29/40, and 11/30/40, and 12/1/40, and 12/2/40, and 12/3/40, and 12/4/40, and 12/5/40, and 12/6/40, and 12/7/40, and 12/8/40, and 12/9/40, and 12/10/40, and 12/11/40, and 12/12/40, 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1. The first of these is the fact that the majority of the population of the United States is of European descent. This is a fact which has been recognized by the government and the people of the United States for many years. It is a fact which has been recognized by the government and the people of the United States for many years. It is a fact which has been recognized by the government and the people of the United States for many years.



Reynolds Co., "solicited customers for the business he then contemplated organizing;" that about August 1, 1927, he was in readiness to engage in his said new business; that on August 1, 1927, he left complainant's employ and "refused further to carry out his contract with said Reynolds Spring Co. and complainant;" that at all times thereafter both said Reynolds Spring Co. and complainant have been willing and able to carry out their contract with him; and that it "was only by reason of his default that the aforesaid contracts were broken."

23rd. That after leaving complainant's employ, Grigolet purchased land and a factory building in Decatur, Illinois, "with the moneys procured by him from complainant and said Reynolds Spring Co. by virtue of his fraud;" that after the building had been equipped as a molding plant, he, individually, began to mold bakelite for the trade under the name "Grigolet," soliciting customers of complainant and said Reynolds Co.; that in confederation with said Burton and one McHenry, he caused to be organized the Illinois corporation of "The Grigolet Co." (a defendant herein, and hereinafter called Defendant Co.) on January 24, 1928; that originally its capital stock was \$10,000, consisting of 100 shares of the par value of \$100 each; that said stock was paid for by "said factory building at 740 East North street, Decatur, which was valued at \$10,000;" that, thereafter, on April 12, 1929, said capital stock was increased to \$317,000; that after January 24, 1928, Defendant Co. engaged in the business of manufacturing presses, machinery, etc. for the molding of "bakelite," and began to mold "bakelite" for the trade, "soliciting customers of complainant and said Reynolds Spring Co., knowledge of whose names Grigolet had gained by virtue of his association with complainant and said Reynolds Spring Co.;" that at the time of the filing of the original bill herein (September 9, 1930) Grigolet was president and a director of Defendant Co.; that other parties (naming them) were other officers and directors; that Grigolet controlled and was practically the sole owner of Defendant Co.; and that in fact it "was an instrumentality employed by Grigolet in the consummation of his fraud upon complainant and said Reynolds Spring Co."

24th. That Grigolet and Defendant Co. have adopted the word "Grigolette" as a trade name, and are using it to characterize their product; and that said word "is the same or similar to the word 'Grigolet,' and that the same are idem sonans."

25th. That prior to August 1, 1927, Grigolet invented a new and useful device (describing it), in connection with the art of molding bakelite; that complainant and said Reynolds Co. caused a patent application therefor to be prepared to be filed in the U. S. Patent Office; that when the application was completed, complainant and said Reynolds Co., on April 9, 1928, forwarded said application to Grigolet at Decatur, requesting him to sign the same and to "execute an assignment thereof to the Reynolds Spring Co.;" that Grigolet attached his signatures to the paper, but failed and refused upon repeated requests to personally fill in certain required blanks; and that as a result of said refusals "the benefits of said invention were lost to complainant and said Reynolds Spring Co."

26th. That from August 1, 1927, when Grigolet left complainant's employ, down to the present time (March 28, 1932), he "has wilfully refused to devote any of his time, services and





ability to the use of complainant;" that in violation of his said contract, by his own acts and by means of his instrumentality (Defendant Co.), Grigoletit "has devoted his time to his own purposes in competition with complainant, to its great and irreparable damage;" and that because of his said breach of his contract, he and the Defendant Co. "have amassed great profits, the amount of which during the past two years complainant has been unable to discover and are unknown to it." Therefore, complainant prays that Grigoletit and Defendant Co. "may be required to answer the interrogatories, hereinafter set forth." (The interrogatories mentioned are seven in number.)

27th. That complainant "is informed and believes, but has no knowledge of the fact," that other new and useful inventions have been made by Grigoletit; that applications for patents upon the same have been filed in the U. S. Patent Office; and that complainant prays a discovery as to same, etc.

28th. That now, at the time of the filing of this bill (March 29, 1932), complainant "is insolvent and lacks the requisite capital for carrying on its corporate existence;" that complainant "has borrowed money from the Reynolds Spring Co., and is heavily indebted to it in the amount of \$17,910, which complainant is now unable to pay;" and that complainant "is not now engaging in any business, except the holding of the aforesaid patents."

The bill prays (1) for a temporary and permanent injunction enjoining Grigoletit and Defendant Company "from engaging in the trade of molding 'Bakelite' and/or any other phenolic products of similar nature, and in the manufacture and sale of presses, apparatus, equipment and machinery for the molding of the same, in competition with complainant;" enjoining Defendant Company "from continuing to use as a part of its corporate name the word 'Grigoletit' or any substitute or imitation thereof;" enjoining Grigoletit "from using the name or word 'Grigoletit' in any way to compete with complainant;" and enjoining Grigoletit and Defendant Company "from using the word 'Grigoletit' in competition with complainant." The bill also prays

(2) For a decree ordering Grigoletit, and the two other and former stockholders (naming them) of complainant corporation to pay to complainant "those monies reasonably and equitably due to it in return for the stock heretofore issued to said Grigoletit."

(3) For a decree that Grigoletit, and the two other stockholders (naming them) of Defendant Company, hold their stock in said Defendant Company "in trust for complainant," and that said Defendant Company "holds all of its property and assets as a trustee for complainant."





(4) For a decree "assessing the value of the patent applications belonging to complainant, so fraudulently abandoned by Grigolet," and "assessing the value of the patent applications which said Grigolet refused properly to execute," and ordering that Grigolet "pay to complainant the fair and reasonable value of said patent applications."

(5) For an accounting "of all profits, royalties, monies or income," accruing to Grigolet and to Defendant Company by virtue of their engaging in the business of molding bakelite and similar moldable products, and of the manufacture and sale of presses, machinery and equipment for the molding of the same, "in competition with complainant," from the date they first began to compete in violation of the contracts aforesaid to the present day; for an accounting "of all fees and royalties in moneys received by Grigolet by virtue of his engaging as a consulting engineer in any and all fields after December 22, 1925, and/or received from the sale or licenses of any U. S. Letters Patent, issued to said Grigolet and of right belonging to complainant."

(6) For a discovery and that Grigolet and Defendant Company be ordered to answer certain stated interrogatories (seven in number.)

(7) For an order commanding Grigolet to assign to complainant all inventions, patents, patent applications, made or acquired by him subsequent to September 1, 1925.

(8) For an order that the contract of December 30, 1925 (Exhibit B) and the receipts passing between Grigolet and the Reynolds Spring Co. on January 15, 1926 (Exhibit C) "be reformed so that they may correctly show the true agreement between the parties hereto," insofar as such contract and receipts "create any ambiguity and do not reflect the actual contract and agreement between Grigolet, complainant and said Reynolds Spring Co., as hereinbefore set forth."

Complainant's counsel state in their printed brief that the bill in question, "taken as a whole, charges a general scheme by Grigolet to defraud the Reynolds Spring Co.," and they first contend in substance that the bill shows such equity on its face, on the ground of fraud against that company, that the court should not have sustained a general demurrer to it or dismissed it for want of equity. It would seem that a sufficient answer to this contention is that the bill is not filed by the Reynolds Spring Co. but by the H. J. Grigolet Co. While it appears that the Reynolds Co. became the owner of all of the capital stock of H. J. Grigolet Co., by purchase from Grigolet individually, the Reynolds Co. is not asking for any relief.



[illegible][illegible]

(b) The following are the names of the persons who are known to have been in contact with the person named in the captioned letter, and the names of the persons who are known to have been in contact with the person named in the captioned letter, and the names of the persons who are known to have been in contact with the person named in the captioned letter.

(7) Has no other community activities in which he is involved.

[illegible][illegible]



Counsel also contend that the action of complainant's directors (Grigoletti, Baker and Burton), on November 18, 1925, in issuing practically all of complainant's capital stock to Grigoletti, in consideration of the transfer to it by him of certain of his property, patents, etc., when they as such directors "knew that Grigoletti could immediately sell the stock for \$100,000," is such a fraud on complainant, and such a violation by them of their fiduciary duties as such directors, as entitles it to maintain the bill. We find no merit in the contention. The bill does not disclose on its face that there was a fraudulent overvaluation of Grigoletti's said property, patents, etc., because by the agreements of December 22nd and December 30th, 1925, between Grigoletti and the Reynolds Co., and the receipts passing between them on January 15, 1926, it appears that complainant's entire capital stock (representing said property, patents, etc.) was actually sold for \$100,000, in money or money's worth to the Reynolds Co., after it had been given ample opportunity to investigate, and had become advised, as to its real value.

Counsel also contend that the bill is maintainable on the theory that "negative specific performance by way of injunction" may be decreed "for breach of a contract for unique personal services." (Citing 4 Pomeroy's Eq. Jur., 4th Ed., Sec. 1710, et seq.) And counsel argue in substance that because of Grigoletti's covenant with the Reynolds Co. (as set forth in paragraph (b), above, of the written agreement of December 22, 1925) as to his entering into a binding contract with complainant company to give his entire services, etc., for a period of five years from December 22, 1925, and because of the allegations in the 21st paragraph of the bill (to the effect that at an unstated time a draft of some kind of a five year employment contract was presented to Grigoletti for his signature

[illegible]

and he refused to sign the same), the bill sufficiently shows that complainant is entitled to the injunctive relief as prayed. In view of the entire allegations of the bill, we are of the opinion that the contention and argument are lacking in substantial merit, because (1) it appears that Grigoleit remained in complainant's employ as an officer for about a year and one-half after its entire capital stock had become the property of the Reynolds Co.; (2) sufficient facts, as distinguished from conclusions, are not stated as to why he left complainant's employ; (3) the contemplated five-year term of his employment had nearly expired when complainant's original bill was filed and the doctrine of laches should here be applied; (4) and it appears affirmatively from the 28th paragraph of the bill that complainant is insolvent and it does not sufficient appear that complainant was able to perform its part of an employment contract with Grigoleit.

Nor, in our opinion, can the bill be maintained, or the injunctive relief as prayed be granted, under the entire allegations of the bill, on the theory that it is one to restrain unfair competition by Grigoleit or the defendant corporation, the Grigoleit Company. It affirmatively appearing in said 28th paragraph of the bill that complainant is insolvent and "is not now engaging in any business except the holding of the aforesaid patents," it is difficult to perceive how Grigoleit or the Grigoleit Co. can be considered as being engaged in unfair competition with complainant.

Our conclusion is that the circuit court did not err in entering the order or decree in question, sustaining the general demurrer to complainant's second amended bill and dismissing said bill for want of equity. Accordingly the order or decree is affirmed.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.



and he refused to sign the same), the bill unconstitutionally shows that complainant is entitled to the injunctive relief as prayed. In view of the entire allegations of the bill, we are of the opinion that the contention and argument are lacking in substantial merit, because (1) it appears that Grigoleit remained in complainant's employ as an officer for about a year and one-half after its entire capital stock had become the property of the Reynolds Co.; (2) sufficient facts, as distinguished from conclusions, are not stated as to why he left complainant's employ; (3) the contemplated five-year term of his employment had nearly expired when complainant's original bill was filed and the doctrine of laches should here be applied; (4) and it appears affirmatively from the 28th paragraph of the bill that complainant is insolvent and it does not sufficient appear that complainant was able to perform its part of an employment contract with Grigoleit. Now, in our opinion, can the bill be maintained, or the injunctive relief as prayed be granted, under the entire allegations of the bill, on the theory that it is one to restrain unfair competition by Grigoleit or the defendant corporation, the Grigoleit Company. It affirmatively appearing in said 28th paragraph of the bill that complainant is insolvent and "is not now engaging in any business except the holding of the above said patents," is its ability to perceive how Grigoleit or the Grigoleit Co. can be considered as being engaged in unfair competition with complainant. Our conclusion is that the circuit court did not err in entering the order as herein in question, sustaining the general counter to complainant's second amended bill and dismissing said bill for want of equity. Accordingly the order as aforesaid is affirmed.

WITNESSED.

Sullivan, P. J., and Bowman, J., concur.

36739

JOHN H. EHARDT,  
Defendant in Error,

v.

FRANK J. BROUCKE,  
Plaintiff in Error.

BRANCH TO CIRCUIT COURT,

COOK COUNTY.

274 I.A. 653<sup>3</sup>

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

The present writ of error concerns a coram vobis proceeding arising under section 89 of the former practice act (Cahill's Stat. 1931, Chap. 110, p. 2183.)

On March 21, 1930, plaintiff commenced an action in the circuit court to recover damages from defendant because of the latter having on March 18, 1930, as alleged, falsely and maliciously spoken and published certain slanderous and defamatory words of and concerning plaintiff. Defendant's appearance was entered by his attorney, Fred J. Loyda, and a plea of not guilty filed to the declaration. More than a year thereafter, on December 24, 1931, upon leave of court and with plaintiff's consent, his attorney withdrew from the case and one Ben Aronin entered his appearance as plaintiff's attorney, and on the same day, on motion of Loyda, Loyda was given leave to withdraw his appearance as defendant's attorney, but it does not appear that thereafter any other attorney entered an appearance as defendant's attorney. About a month thereafter, on January 28, 1932, it is claimed that Aronin, as plaintiff's attorney, caused a written notice (that the cause would be placed on the trial calendar) to be sent by registered mail to defendant in care of "City Hall, Berwyn, Illinois;" that a registry return receipt, signed "Frank J. Broucek, by

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JOHN H. HARRIS  
Defendant in error

JOHN H. HARRIS  
Defendant in error

ORDER TO DISMISS CASE

JOHN HARRIS

374 I.A. 658

THE JUDICIAL COUNCIL OF THE DISTRICT OF COLUMBIA

The Judicial Council of the District of Columbia

has considered the petition of the respondent and

has concluded that the petition should be denied.

IT IS ORDERED that the petition be denied.

The respondent is to pay the costs of the petition.

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Evelyn Cerny," was returned to Aronin; and that the cause was placed on the trial calendar. Over a year thereafter, on March 16, 1933, the following order in substance was entered:

That, on motion of plaintiff's attorney, leave is hereby given to plaintiff to file his similiter to plea herein instantly.

That thereupon, the cause being called for trial ex parte, the plaintiff comes by attorney; that, it appearing that neither plaintiff nor defendant has made demand or paid for a trial by jury, this cause is submitted to the court for trial without a jury; that the court, after hearing all evidence and being fully advised, finds the defendant guilty and assesses the plaintiff's damages at the sum of \$5,000; that the court, in answer to a special interrogatory submitted by plaintiff, further findsthat the conduct of defendant, Frank J. Broucek, "as shown by a preponderance of the evidence," was "expressly malicious and actuated by an evil intent, design and purpose;" and that, therefore, it is considered by the court that the plaintiff "do have and recover of and from the defendant, Frank Broucek, his said damages of \$5,000, in form as aforesaid assessed, together with his costs and charges, and have execution therefor."

The common law record further discloses that 18 days thereafter, on April 3, 1933, but after the expiration of the term of court during which the judgment was entered, defendant appeared by an attorney, named Shapiro, and filed a written motion to vacate the judgment, supported by defendant's affidavit; that on the same day, by leave of court, three counter affidavits were filed, - one by plaintiff and the others by plaintiff's attorney, Aronin, and an assistant in his office, named Barelik; and that the stated grounds of defendant's motion are in substance as follows:

That defendant has a complete defense on the merits to the whole of plaintiff's demand.

That "no notice was ever at any time served upon him or his former attorney, Loyda, " \* to place this cause upon a trial calendar."

That during the month of April, 1931, "plaintiff promised and agreed not to prosecute this action but to dismiss the same," and that since that time plaintiff, "on several occasions (the last being during the month of March, 1932) stated to defendant that the cause had duly been dismissed out of court."

That the above facts did not and do not appear of record in the cause, and were unknown to the court when said judgment was entered, and, had they been known, the court would not have entered said judgment.





The common law record further discloses that on April 7, 1933, after a hearing upon defendant's motion, the court refused to vacate the judgment and ordered that it stand in full force and effect as of the date of its rendition; that on April 14, 1933, on a further hearing defendant's motion for a reconsideration was denied; and that subsequently and within apt time defendant's bill of exceptions, containing all affidavits that were presented on the hearings, was approved by the court and filed.

In defendant's affidavit, sworn to on March 31, and filed on April 3, 1933, he alleged in substance that he did not learn of the entry of the ex parte judgment, rendered against him on March 16th, until March 24th; that he has a complete defense to plaintiff's action in that he did not speak or publish on March 16th, or at any other time, the slanderous words of or concerning plaintiff, as charged in plaintiff's declaration; that when, on December 24, 1931, the court permitted defendant's then attorney to withdraw his appearance in the cause defendant did not employ other counsel "because of plaintiff's promises and agreements," namely, that "sometime during April, 1931," in a conversation he had with plaintiff about the pending cause, "plaintiff promised and agreed not to prosecute this action but to dismiss the same;" that "since that time, on several occasions (the last during the month of March, 1932), plaintiff stated to affiant that said cause had been duly dismissed, and that affiant, relying thereon, took no further action in connection with the defense." and defendant further alleged that he "had no knowledge or notice of the withdrawal and substitution of attorneys for plaintiff;" and that "no notice was ever at any time served upon him, nor upon his former attorney before his withdrawal, by plaintiff or his attorney, to place the cause upon a trial calendar."



The common law power of arrest is not an absolute  
power. After a hearing upon defendant's motion, the court refused  
to vacate the judgment and ordered that it stand in full force and  
effect as of the date of the judgment, that is, April 12, 1934, on  
a further hearing defendant's motion for a reconsideration was  
denied and that reconsideration was denied and defendant's will  
of reconsideration, notwithstanding all objections then were presented on the  
hearing, was affirmed by the court and filed.  
In defendant's affidavit, sworn to on March 31, and filed  
on April 6, 1934, he alleged in substance that he did not learn of  
the entry of the ex parte judgment, returned against him on March  
12, until March 27th, that he had a complete defense to plaintiff's  
claim and that he was not aware of plaintiff's claim until  
or at any other time, the allegations made of an accompanying complaint,  
and that he was plaintiff's defendant's claim against him until  
1934, and that plaintiff's claim against him was not known to him  
until the same defendant did not employ other counsel  
"because of plaintiff's promise and agreement," namely, that  
"sometime during April, 1934," in a conversation he had with plaintiff  
about the pending case, "plaintiff promised and agreed not to  
pursue this action and to dismiss the same." That "since that  
time, on several occasions (the first during the month of March,  
1934), plaintiff stated in writing that such action was being  
dismissed, and that plaintiff, relying thereon, took no further action  
in connection with the defense," and defendant further alleged that  
he "had no knowledge or notice of the plaintiff's action until  
the plaintiff's complaint was filed on April 12, 1934," and that "the motion was made at that time  
and that since that time his former attorney believed his withdrawal  
of plaintiff on his attorney to place the same upon a writ

The counter affidavits of plaintiff's attorney, Aronin, and of his assistant, Marelik, are to the effect that on January 29, 1932, defendant was notified by a registered letter that the cause would be placed upon the trial calendar; that the letter was addressed to defendant in care of "City Hall, Berwyn, Illinois;" and that a registry return receipt, signed "Frank J. Bruceck, by Evelyn Cerny" was returned to Aronin. The salient allegations in plaintiff's counter affidavit are that in January, 1932, the said "Evelyn Cerny was the secretary in charge of the office of Frank J. Bruceck, which was at the time located in the City Hall of Berwyn, Illinois;" that he (plaintiff) "had never at any time held any conversation with defendant in which I stated, indicated or implied that I would dismiss or cause to be dismissed the above entitled cause, or that I would not prosecute the same;" that plaintiff, shortly after defendant had spoken and published said salderous words, caused defendant to be criminally prosecuted and fined therefor before a justice of the peace; and that "John O. Hruby, who appeared as defendant's attorney before the county court, attempting to avail for his client the benefits of the Insolvent Debtor's Act, told this affiant that the judgment would be settled and adjusted."

The bill of exceptions further discloses that on April 7, 1933, when defendant's motion to set aside the judgment first came on for hearing defendant asked leave to file three additional affidavits, for the purpose of contradicting certain statements made by plaintiff in his said counter-affidavit, - one by defendant, and the others by said Hruby and one Robert Brown. Upon objections being made by plaintiff's attorney, the court refused to allow said additional affidavits to be filed, or to consider them, and thereupon, after argument, entered the order in question, refusing to set aside said judgment against defendant of \$5,000.





entered as above stated on March 16, 1933.

Said additional affidavits are contained in the bill of exceptions. The salient allegations of defendant's affidavit are that "Evelyn Cerny, the person who it is alleged signed a registry receipt for a letter addressed to this defendant by plaintiff's attorney, was never at any time his secretary nor employed by him in any manner;" that neither during January, 1932, nor at any other time, was she in charge of defendant's office or working therein; that defendant never received or saw said claimed registered letter; and that he "never at any time made any admission that he had used the language attributed to him in the Declaration." In Hruby's affidavit, while admitting that he appeared as defendant's attorney "before the county court," he alleged that he "never at any time told plaintiff or any one else that the judgment in this case would be settled and adjusted." In Brown's affidavit he alleged that "sometime in the latter part of the year 1931," he was present at a conversation between plaintiff and defendant in the city hall at Berwyn; that he heard plaintiff say to defendant that he (plaintiff) "was grateful to defendant for what defendant had done for him in connection with reinstating him (plaintiff) as Police Magistrate, that he expected not to run again when his term expired, that he would help defendant gain the office of Police Magistrate, that he would not prosecute the suit he had filed but would dismiss it, that he would forget all that had occurred during the campaign, and that Broucek (defendant) should do likewise."

After a careful consideration of the present record we have reached the conclusion that the court erred in refusing on April 7, 1933, to grant defendant's motion to set aside said ex parte judgment for \$5,000, entered against defendant on March 16, 1933.

It clearly appears that contrary to rules Nos. 21 and 23

[illegible]



of the circuit court and of the provisions of section 16 of said former Practice Act (in force prior to January 1, 1934), defendant (his former attorney having withdrawn as such in the slander suit) did not receive personal notice as distinguished from notice by mail that said cause would be placed upon the trial calendar. In our opinion such personal notice is required and the lack of it constitutes an error of fact within the meaning of section 39 of said former practice act. (See Kiesdorf v. Pyfe, 250 Ill. App. 122, 126; Swierga v. Nalenka, 259 Ill. App. 262, 265; Harland Refining Co. v. Lewis, 264 Ill. App. 163, 167-8; Chicago Title & Trust Co. v. Lauletta, 265 Ill. App. 364, 368; Grabowski v. MacLuskey, 257 Ill. App. 434, 491; Haj v. American Bottle Co., 261 Ill. 362, 364-5.) Furthermore, in our opinion, it sufficiently appears that defendant, personally, did not receive by mail a notice that said cause would be placed upon the trial calendar. Furthermore, in our opinion, it sufficiently appears that after defendant's former attorney had withdrawn from the case, plaintiff, by his statements and representations to defendant that the slander suit would not further be prosecuted but would be dismissed, caused defendant to entertain a belief that he need not take any further steps in the defense of the suit. (See Chapman v. American Life Ins. Co., 292 Ill. 179, 189.) And we are of the opinion that the court, in view of the statements contained in the counter affidavit of plaintiff, erred in refusing to consider defendant's additional affidavit and the affidavits of Hrbby and Brown.

The order of the circuit court of April 7, 1933, refusing to vacate the ex parte judgment in the slander suit against defendant of March 16, 1933, is reversed, and the cause is remanded with directions to the circuit court to set aside said judgment, and to have a trial of the slander suit upon its merits.

REVERSED AND REMANDED WITH DIRECTIONS.  
Sullivan, P. J., and Scanlan, J., concur.



of the circuit court and of the provisions of section 12 of  
said former statute act (in force prior to January 1, 1904).  
Defendant (his former attorney having withdrawn as such in the  
interim) will not receive notice as distinguished  
from notice by mail that same would be placed upon him  
trial calendar. In any event such notice would be required  
and the fact of its completion in error of fact within the meaning  
of section 12 of said former statute act. (See Winters v. Winters,  
200 Ill. App. 2d 100; Winters v. Winters, 200 Ill. App. 2d 100, 101;  
Winters v. Winters, 200 Ill. App. 2d 100, 101-102; Winters v. Winters,  
200 Ill. App. 2d 100, 101-102; Winters v. Winters, 200 Ill. App. 2d 100, 101-102;  
Winters v. Winters, 200 Ill. App. 2d 100, 101-102; Winters v. Winters, 200 Ill. App. 2d 100, 101-102;  
Ill. 200, 204-205.) Furthermore, in my opinion, it is entirely  
apparent that defendant, personally, did not receive by mail a notice  
that said same would be placed upon the trial calendar. Further-  
more, in my opinion, it is entirely apparent that after defendant's  
former attorney had withdrawn from the case, finally, by his de-  
parture and representation as withdrawn, that the same was would  
not further be presented but would be dismissed, unless defendant  
be entered in a belief that he need not take any further steps in  
the defense of the suit. (See Winters v. Winters, 200 Ill. App. 2d 100, 101-102;  
200 Ill. App. 2d 100, 101-102.) And we are of the opinion that the court,  
in view of the statements contained in the court's affidavit of  
discovery, acted in refusing to consider defendant's additional  
affidavit and the affidavit of Henry and Brown.  
The order of the circuit court of April 17, 1904, refusing  
to consider the affidavit of Henry and Brown in the manner will against defendant  
at which it is stated, and the same is recommended with this  
order to the circuit court for not only judgment, and to have  
a trial at the circuit court with the same.  
Affirmed. 200, 204-205, 206.

36910

C. I. F. CORPORATION,  
Plaintiff and Appellant.

v.

WILLIAM WEBER, LUCILLE WEBER and  
FRANCIS GIVENS (sued as Mary Roe),  
Defendants.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

FRANCIS GIVENS,  
Appellee.

274 I.A. 653

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

On September 19, 1932, plaintiff commenced in the municipal court an action in replevin to recover the possession of an automobile, described in the affidavit as a "Buick Sedan (1932), Serial No. 01471, Motor No. K-1650, together with all equipment and accessories." From the bailiff's return on the writ it appears that on September 20th, he replevied the automobile and "delivered the same to plaintiff," and that on the following day he served the writ on "Mrs. F. Givens, sued as Mary Roe." Thereafter the joint appearance of William and Lucille Weber and Francis Givens was entered by their attorneys, and on February 6, 1933, the two Webers filed an affidavit of merits, sworn to by said Francis Givens as their agent. On February 25, 1933, the court, "by agreement of plaintiff and defendants," ordered that the suit be dismissed as to both Webers. This left the suit pending only as against Francis Givens. Thereafter there was a trial before the court without a jury, at which a mass of oral and documentary evidence was introduced, and at its conclusion the case was continued to April 7, 1933, for decision, on which day, after arguments, the court found "the right of property

M. C. R. A. C.

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DATE 08-19-2006 BY SP-6 BTJ/KAL

## APPENDIX B

• **and** **or**

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THE AL BOMBARDIERE TITANIC, LINE, ON 1914

and "believed the same to be correct," and that on the following

[illegible]

THE UNIVERSITY OF CHICAGO

1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes. Once the causes have been identified, the next step is to develop a plan of action. This involves identifying the steps that need to be taken to solve the problem and determining the resources that will be needed to implement the plan. Finally, the last step in the process is to evaluate the results of the plan. This involves monitoring the progress of the plan and determining whether the problem has been solved.

• *These are not intended to replace the information on the label.*



in defendant, Mrs. F. Givens and, after denying plaintiff's motions for a new trial and in arrest of judgment, adjudged that she "have and recover of the plaintiff the possession of the property involved," that "a writ of retorno habendo issue," and that she recover her costs. The present appeal by plaintiff followed.

In said affidavit of merits, Frances Givens alleged that "she is the duly authorized agent of the defendants, William and Lucille Weber," that she is acquainted with the facts, and that she believes that "said defendants" have a good defense to the suit upon the merits. She further alleged in substance:

That prior to May 14, 1932, "on behalf of said defendants" she was in negotiations in Chicago with the "Royal Sales & Service Co." (an unincorporated company, of which Jacob W. Goldenberg was the proprietor, hereinafter referred to as the Sales Co.) for the purchase of a new Rockne sedan automobile with accessories at the price of \$715; that these negotiations were had with an agent of the Sales Co., one John Patterson; that on May 14, 1932, she paid on account the sum of \$115 in cash, and also the sum of \$300, "by delivery to the Sales Co. of an used Lincoln sedan," leaving a balance unpaid of \$400, "which said sum it was agreed should be paid in monthly installments over a period of one year;" that Patterson represented to her and to said defendants that said sum of \$400 "would be carried by" the Sales Co.; that Patterson presented to the defendants (the Webers) "an instrument in blank which he asked them to sign, saying that he would fill in the blanks the terms and conditions of the sale and the payments to be made as above set forth;" that thereupon they, relying upon Patterson's representations, "executed said instrument in blank" (a conditional sales contract, on a printed form, dated May 14, 1932, with said Sales Co., including said defendant's note for the total amount of said monthly installments, etc.); that thereafter defendants heard that "plaintiff claimed to be the assignee" of said contract and note, and, upon investigation, found the same to be in plaintiff's possession, bearing defendants' signatures, "which, as affiant believes, are the genuine signatures of defendants;" that, however, said contract "purports to show initial payments of only \$235, instead of \$315 as actually made by affiant for the benefit of defendants, and also a finance charge of \$86.16, which was never agreed to by defendants;" and that, because of the foregoing, affiant "denies that plaintiff is the owner of the automobile described in the writ, or is entitled to the possession thereof."

On the trial plaintiff, to make out its prima facie case, called said Goldenberg as a witness, and introduced in evidence (a) the conditional sales contract with the Sales Co. for the automobile in question, signed by the two Webers at Milwaukee, Wisconsin, under





date of May 14, 1932, and which had attached thereto the written assignment of the contract by the Sales Co. to plaintiff, of the same date, together with all its right, title and interest in and to said automobile; (b) the judgment note of the Webers, of the same date, for \$560.16, payable to the order of the Sales Co. in 12 equal monthly installments of \$46.68, with interest, - the first installment being payable one month after said date at plaintiff's office in Chicago, and the note bearing the indorsement of the Sales Co., without recourse, to plaintiff; and (c) two original receipts, produced by Frances Givens, given by plaintiff to her, under the respective dates of June 15th and July 21st, 1932, showing two payments to it of \$46.68 each, - being for the first two installments due on said contract and note. Thereupon her attorney admitted that "no further payments were made" to plaintiff on said contract and note. The contract contains provisions as are usually found in conditional sales' contracts; the automobile in question is fully described; the "cash selling price," including the extra equipment, is stated to be \$715, and the "time price," which includes a "finance charge of \$80.16," is stated to be \$795.16; of the last mentioned price it is stated that a payment thereon of \$228 has been made, and that the balance due of \$560.16 (the amount of said note) is to be paid in "12 equal monthly payments of \$46.68." Goldenberg, proprietor of the Sales Co., testified in substance that he was present in his Chicago office when the blanks of the printed forms of the contract and note were filled in by typewriting; that the instruments, so filled in, were taken by John Patterson to Milwaukee, Wisconsin, to be there signed by the Webers and returned to him (Goldenberg); that the instruments were returned to him bearing the Webers' signatures thereon; that he "sold the contract and note to plaintiff;" that he signed the assignment of the contract to plaintiff and indorsed the note; that he then made out a draft for



date of May 14, 1932, and which had attached thereto the written assignment of the contract by the seller to the plaintiff of the same date, together with all the rights, title and interest in and to said automobile; (5) the judgment made at the hearing of the same date, for \$200.00, payable to the order of the seller to the plaintiff monthly installment of \$20.00, with interest, - the first installment being payable one month after said date at plaintiff's office in Chicago, and the note bearing the endorsement of the seller, with interest, as plaintiff and (6) the original receipts, produced by Thomas Givens, given by plaintiff to her, under the respective dates of June 1931 and July 1932, showing the payment of \$10.00 at each, - being for the first two installments (the same interest and note). Thereupon her attorney advised that "the further payments were made" so plaintiff on said receipt and note. The receipt contains provisions as are similarly found in conditional sales, covering the automobile in question is fully described as "gray touring car", including the motor equipment, is stated to be 'V12', and the "cash price", which includes a "finance charge of \$20.00", is stated to be \$200.00. At the last mentioned price it is stated that a payment thereon of \$20.00 has been made, and that the balance due is \$180.00 (the amount of said note). It is to be paid in "12 equal monthly payments of \$20.00", beginning on the date of the note as is recited in recitation that he was present in his Chicago office and the names of the parties to the contract are also given in the recitation that the instrument, as filed in court, signed by John Johnson to Milwaukee Wisconsin, is to be given by the seller and returned to him (Johnson) that the instrument was returned to him bearing the seller's endorsement, and he "sold the contract and note to plaintiff" and he signed the assignment of the contract and note plaintiff and endorsed the note that he then made out a draft for

\$480 and attached said note and contract as so assigned to said draft; and that thereafter plaintiff paid the draft and the Sales Co. received \$480.

Frances Givens testified at considerable length both on direct and cross-examination, and she called as a witness said William Weber. Plaintiff, in rebuttal, thereupon called as witnesses said John Patterson and also John L. Weitlauf and H. H. Foote, respectively house attorney and collection manager for plaintiff, and introduced in evidence certain writings. In sur-rebuttal Frances Givens and Weber gave further testimony, and she introduced in evidence other writings. No useful purpose will be served in detailing the testimony of these witnesses. Suffice it to say that from the entire evidence, oral and documentary, the following salient facts appeared: Early in April, 1932, Frances Givens visited the Sales Co.'s place of business for the purpose of purchasing for herself a new automobile partially on time payments and partially by an allowance on her old Lincoln automobile. She made out and signed a detailed "credit application," knowing that the same would be submitted to an automobile finance company. Two such companies rejected the application. Finally, she seemed to be filled out another application in the name of her nephew, William Weber, then in Milwaukee, giving to Patterson all details as to his financial standing, etc. This application proving to be acceptable, the conditional sales' contract and note above mentioned were signed by the Weber and delivered. The contract, as is usual in such instruments, reserved the title to and ownership of the new automobile in the Sales Co., or its assigns, until the entire deferred indebtedness, amounting to \$860.00, should be fully paid. This amount was to be paid in twelve equal monthly installments of \$71.66 each. After the contract and note, by assignment and indorsement, had come into the possession of plaintiff, an





automobile finance company. It mailed to the Teters at Milwaukee, under date of May 10, 1932, a letter or notice, which shortly thereafter was received by Frances Givens by mail from the Teters, giving full detailed particulars of the entire transaction, describing the automobile in question, and saying: "We are pleased to notify you that we have purchased from your dealer \* \* the documents you signed when taking delivery of the commodity described herein. For your convenience we have indicated the amount of your obligation, amount of your installments, and the due date. Make each payment direct to our office, \* \* ." After this letter or notice had been received by Frances Givens she paid to plaintiff at its office in Chicago the first two installments of \$10.00 each, due respectively on June 15th and July 15th, 1932, but neither she nor the Teters ever made any further payments on the note or contract to plaintiff.

After a careful review of all the evidence we have reached the conclusion that the court's finding and judgment, above mentioned, are contrary to the clear preponderance of the evidence and that the judgment must be reversed. While some of the evidence introduced on the trial by Frances Givens tended to sustain the defenses to plaintiff's suit as mentioned in the affidavit of merits, plaintiff's evidence is overwhelmingly to the contrary. Furthermore, in our opinion, it must be held that her action, in paying to plaintiff without objection the exact amount of the first two installments as mentioned in the conditional sales' contract after said contract had been assigned to plaintiff by the Teters Co., amounted to a ratification of said contract by her according to its terms.

Accordingly, the judgment of the municipal court of April 7, 1933, is reversed, and judgment is entered here that the right to the possession of the automobile in question was and is in the plaintiff, C. I. T. Corporation.

REVERSED AND JUDGMENT HERE.  
Sullivan, P. J., and Scanlan, J., concur.

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FINDING OF FACT:

We find as a fact that the right to the possession of the automobile involved in this case was and is in the plaintiff, C. I. W. Corporation.



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THE WESTERN AND SOUTHERN LIFE  
INSURANCE CO., a corporation,  
(complainant),

Appellant,

v.

KAZIMIERA TOMASUN,  
(defendant),

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Two appeals  
consolidated  
for hearing.

37042

KAZIMIERA TOMASUN,  
(plaintiff),

Appellee,

v.

THE WESTERN AND SOUTHERN LIFE  
INSURANCE CO., a corporation,  
(defendant),

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

274 I.A. 654

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On June 3, 1928, complainant (hereinafter called the Insurance Co.) issued its policy of insurance on the life of Emily Tomasun of Cicero, Illinois, for \$2,000. Defendant, daughter of insured, was named as beneficiary. The policy contained the provisions that "this policy and the application herefor, a true copy of which is indorsed hereon or securely attached hereto, constitute the entire contract between the parties, and shall be incontestable after two years from its date, except for non-payment of premiums," and that all statements made by the insured in the application "shall, in the absence of fraud, be deemed representations, and not warranties, and no such statement shall avoid the policy, unless it is contained in the written application." The insured died in a hospital at Madison, Wisconsin, on September 13, 1929, less than two years after the policy was issued. On June 4, 1930

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ANNUAL REPORT  
CINCINNATI COUNTY  
COURT REPORT

two species  
connected  
for hearing.

274 I.A. 653

ANNUAL REPORT  
CINCINNATI COUNTY  
COURT REPORT

274 I.A. 654

THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
(continued)

APPEALS  
APPEALS  
APPEALS

THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
(continued)

THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
(continued)

MR. JUSTICE GRANT DELIVERED THE OPINION OF THE COURT.

On June 2, 1938, complainant (hereinafter called the

Insured Co.) issued the policy at issue on the life of

Emily Johnson of Chicago, Illinois, for \$2,000. Defendant, defendant

of insured, was named as beneficiary. The policy contained the

provisions that "this policy and the application hereof, a true

copy of which is attached hereto or severally attached hereto, con-

stitute the entire contract between the parties, and shall be

irrevocable after the date of issue, except for non-payment

of premiums," and that all statements made by the insured in the

application "shall, in the absence of fraud, be deemed representations

and not warranties, and no such statement shall void the policy,

unless it is contained in the written application." The insured

died in a hospital at Madison, Wisconsin, on September 22, 1939.

Less than two years after the policy was issued. On June 4, 1938



(one day less than two years after the policy was issued) the Insurance Co. filed its bill in the circuit court of Cook county against defendant, alleging in substance that certain of the insured's answers to questions on her application (as given to the medical examiner and as written down by him on the application concerning the present and past condition of her health), were false and fraudulent and known by her to be such, that if the Insurance Co. had known of their falsity it would not have issued the policy, and that it did not discover their falsity until after her death. The bill tendered back all premiums paid, and prayed that the policy, because of said fraud, be declared to be null and void; that defendant, as beneficiary, her agents and attorneys, be temporarily and permanently enjoined from prosecuting any suit on the policy; and that it be ordered to be delivered up for cancellation. On June 16, 1930, the sheriff returned the summons "defendant not found," and apparently the Insurance Co. made no further attempt to get service upon defendant. On September 23, 1930, she (apparently not yet being advised of the pendency of the chancery suit) commenced in the superior court of Cook county an action in assumpsit to recover the amount due on the policy, and, after service, the Insurance Co. on December 4, 1930, filed a plea setting up the pendency of the chancery suit as a bar to the action. No plea to the merits was filed. On February 18, 1931, the superior court sustained a demurrer to the plea and gave the Insurance Co. leave to file an amended plea. In the meantime, in the chancery suit, and after defendant had entered her appearance therein, the Insurance Co. applied for a temporary injunction, after notice to defendant, and, on February 26, 1931, the court issued a temporary injunction, enjoining her from the further prosecuting of the assumpsit suit, or the prosecuting of any action in law or equity against the Insurance Co., until the further order of the court.

(one day later than the policy was issued) the  
Insurance Co. filed its bill in the circuit court of each county  
before the trial, stating in substance that within 30 days of the  
issuance of the policy on her application (as given to the medical  
examiner and as attested to by him on the application concerning the  
present and past condition of her health), were false and fraudulent  
and issued by her to be paid, that if the Insurance Co. had known of  
this fact it would not have issued the policy, and that it did  
not discover this fact until after her death. The bill prayed  
back all premium paid, and prayed that the policy, because of said  
fraud, be declared to be null and void; that defendant, as beneficiary,  
her agents and assigns, be permanently enjoined from  
presenting any claim on the policy; and that it be ordered to be  
dismissed up for consideration. On June 12, 1930, the court rendered  
the summary "defendant not found," and apparently the Insurance Co.  
made no further attempt to get service upon defendant. On September  
22, 1930, she (apparently not yet being advised of the pendency of  
the summary suit) commenced in the superior court of each county  
an action to renewal to recover the amount due on the policy, and  
after summary, the Insurance Co. on December 4, 1930, filed a plea  
setting up the pendency of the summary suit as a bar to the action.  
On June 12, 1930, the court rendered a summary judgment in favor of  
defendant, stating a summary for the plea and gave the Insurance Co.  
leave to file an amended plea. In the meantime, in the summary  
suit, and after defendant had advised that defendant desired the  
Insurance Co. applied for a summary judgment after notice to  
defendant, and on January 10, 1931, the court rendered a summary  
judgment, stating that the court presumes all the  
statements made in the pleading of any action in law or equity  
against the Insurance Co. until the contrary is shown.



Thereafter, on February 28, 1931, the Insurance Co. filed an amended plea in the assumpsit suit, setting up the pendency of the chancery suit and the issuance of said injunction as a bar. It did not file any plea to the merits. Thereafter, said beneficiary filed a general and special demurrer to the bill in the chancery suit, upon which no action was taken until during December, 1932, when the demurrer was overruled, and she filed an answer to the bill, in which she denied that the Insurance Co. was entitled to any of the relief prayed, etc. Thereafter a hearing was had in open court at which several witnesses testified for the Insurance Co., the depositions of other witnesses were read, and one witness (Mrs. Anton) testified for defendant. The policy and application and other writings were introduced in evidence by the Insurance Co. On April 3, 1933, the Court entered a decree in which, after making numerous findings, it is adjudged that the temporary injunction (above referred to) be dissolved, that the bill "be dismissed for want of equity," and that the Insurance Co. pay all costs. From the decree the Insurance Co. prayed and perfected the present appeal to the June Term, 1933, of this appellate court (Case No. 36889).

After the entry of the decree, the prosecution of the assumpsit suit was resumed in the superior court. On April 26, 1933, plaintiff (beneficiary of the policy) appeared and moved the court to strike the amended plea of the Insurance Co. (filed February 28, 1931) and after argument of opposing counsel the court sustained the motion and gave the Insurance Co. leave to file an amended plea, and on April 27th it filed what is entitled: "Second Amended Plea with Notice and Affidavit of Merits." It is a plea of the general issue, together with a notice that on the trial the Insurance Co. "intends to rely upon special matters of defense, which are set forth and contained in the following affidavit of merits:" (Here follows an



Thereafter, on February 28, 1934, the Insurance Co. filed an amended  
plea in the Insurance Co. setting up the genuineness of the company  
and the Insurance Co. set aside its motion. It did not file  
any plea to the motion. Thereafter, said bench set aside a previous  
and special demand to the bill in the company and, upon which  
the motion was later made setting aside, 1934, when the company  
was notified, and she filed an answer to the bill, in which she  
admitted that the Insurance Co. was entitled to set up the alleged  
fact. Thereafter a hearing was had in open court at which several  
witnesses testified for the Insurance Co., the testimony of which  
statements were read, and the witness (John Jones) testified that  
the policy was delivered and other witnesses were introduced.  
In evidence by the Insurance Co. was a letter to the Insurance Co.  
dated in which, which being written, it is alleged  
that the company's intention (above referred to) be dissolved, that  
the bill be dismissed for want of equity, and that the Insurance  
Co. pay all costs. This was done by the Insurance Co. before the  
trial of the case, and the Insurance Co. filed a stipulation  
and (Case No. 22222).

After the entry of the decree, the presentation of the  
Insurance Co. was made in the superior court, on April 10, 1934,  
against (Insurance Co. of the policy) against and moved the court to  
set aside the decree of the Insurance Co. (Filed February 20,  
1934) and after argument of opposing counsel the court sustained the  
plea and gave the Insurance Co. leave to file an amended plea, and  
that after it filed such a motion, the court would then rule  
thereon and affirm or set aside. It is a plea of the Insurance Co.  
that with a notice that on the trial the Insurance Co. "intends  
to set aside the decree of the court, which was set aside and com-  
menced in the Insurance Co. (Case No. 22222) (Here follows an

affidavit sworn to by one of the attorneys of the Insurance Co.) In the affidavit there are allegations that the insured made certain false answers to the medical examiner's questions as set down in the application; that above her signature on the application are certain other statements or declarations, and that some of the statements or declarations were false, etc. The allegations are substantially the same as those alleged in the bill filed in the chancery suit. On May 3, 1933, plaintiff filed a demurrer to said special matters of defense, and for cause of demurrer stated that by the terms of the policy the same was to be incontestable after two years, except for non-payment of premiums; that "said matters of defense pleaded by defendant do not set up non-payment of premiums but seek to avoid payment of the policy on causes extrinsic thereto;" and that said action in assumpsit to collect the amount of the policy was commenced more than two years after the date of the policy, and that, hence, the policy is incontestable. On June 6, 1933, after argument, the superior court entered an order and judgment in substance as follows: That on plaintiff's motion the court orders that said amended plea of the Insurance Co. "be stricken for want of a sufficient affidavit of special defense;" that defendant's default be entered; that "after hearing all allegations and proofs submitted," the court assesses plaintiff's damages at \$2400 (amount of the policy and accrued interest); and that judgment be entered against the Insurance Co. and in favor <sup>of</sup> plaintiff in said sum. From the judgment the Insurance Co. prayed and perfected an appeal to the October, 1933, Term of this Court (Case No. 37042.)

Thereafter, on November 7, 1933, on motion of the Insurance Co., supported by the affidavit of one of its attorneys, the two appeals were here ordered to be consolidated for hearing and to be considered together. In said affidavit it is alleged that "both cases involve the same parties and the same subject matter and \* \*



of the insurance policy, the plaintiff sought to have the policy voided on the ground that the defendant had committed fraud in obtaining the policy. The defendant denied the charge of fraud and sought to have the policy upheld. The court found in favor of the plaintiff and voided the policy.



should be considered together." A certificate of evidence and a bill of exceptions are contained in the respective transcripts of record.

In the circuit court's decree in the chancery suit, entered April 3, 1933, it is stated that "it appearing to the court that the answers to the questions in the application for insurance were made in good faith and were not known to be false and untrue by the insured; \* \* that the insured \* \* was illiterate and an unintelligent woman, incapable of reading or writing the English language and incapable of fully understanding the questions put to her; \* \* that the medical examiner and doctor for complainant made a full and complete physical examination of the insured prior to the issuance of the policy; and that the court, being fully advised in the premises and in consideration thereof, doth find:" That the equities are with the defendant; that the complainant has "failed to sustain the material allegations" of its bill; and that it "is not entitled to the relief, or any part thereof, demanded." And it appears from the certificate of evidence that, after all evidence had been introduced on the hearing, but before the decree had been entered, the chancellor made a statement as follows:

"I want to make myself clear so that any reviewing Court \* \* will understand what was in this Court's mind.

Here is a report, Exhibit 7, which is called a Medical Examiner's Report of the Western and Southern Life Insurance Company taken by Dr. Kelly, who was a young physician, and he asked her a lot of questions. Now, Mrs. Tomasz was a Lithuanian and a sample of her language and her understanding of the English language was illustrated, I think, by the manner in which some of the other witnesses testified yesterday of Lithuanian extraction. There were several witnesses here who said she couldn't read English and that she understood it very poorly. The Doctor asked her a lot of questions in English and then he writes down the answers.

Now, Mrs. Anton said she was present when these questions were propounded to Mrs. Tomasz and she said the Doctor only asked her two or three questions. There was some doubt in her mind as to whether he asked her anything about prior operations, and so on, and there is considerable doubt in my mind as to whether he did, and, if he did, whether she understood what he was talking about.

Here are some questions - there are over twenty questions on here that he asked her, all answered 'No'. You know and I know the way these things are done. The medical examiner comes in and,

should be considered together." I understand of evidence and a  
all of questions and answers in the descriptive language of

to have

In the present state of the country...

entered April 2, 1935. It is stated that "it appearing to the court

that the answers to the questions in the questionnaire for instance

are made in good faith and were not made in bad faith and were

by the insured." "That the insured was a fit and sane

unintelligent woman, incapable of coming to selling the English

language and incapable of fully understanding the questions put

to her." "That the insured was a fit and sane woman and

made a full and complete physical examination of the insured prior

to the issuance of the policy and that the insured being fully advised

in the premises and the consideration thereof, each party, that the

policy was with the insured; that the consideration was \$1000.00

and the material statement of the bill, that the bill is not

entitled to the title of "policy" and that the bill is not

entitled to the title of "policy" and that the bill is not

and been introduced on the hearing, and before the court has been

entered, the consideration made a statement as follows:

"I want to state again that on that day receiving from

"I will understand what was in this case's mind.

There is a report, Exhibit 7, which is called a Medical

Examination of the insured and Exhibit 8, which is called a Medical

Examination of the insured, and on that day a young physician, and on that day a

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if you are thoroughly conversant with the English language and he asks you all these questions, you do pretty well to answer all of them accurately, if you are thoroughly honest and fairly conversant with the English language. But you get a man speaking English to a woman of Lithuanian extraction, firing questions at her, and expect her to answer all of them is expecting more than anyone has a right to expect.

I doubt very much \* \* that this woman understood what was going on when this Doctor sat there firing questions at her and filling out this report. One thing is certain, she couldn't read, because the evidence is undisputed she wasn't familiar or conversant with English sufficiently so that she could read. She could not read English, so that the Doctor after filling out these questions and asking her to sign - he didn't say she read it. There is no evidence anyone translated it to her and I don't believe she understood what this questionnaire was and what was on it, and as a result of that I say there couldn't have been any fraud or deceit or intentional withholding or misrepresentation of any fact.

I think it was just like a mill. That is the way they do these things and that is how this was evidently done. Here are a lot of questions propounded to a Lithuanian woman who neither reads nor writes English and then she is asked to sign a document which she couldn't read, and then you come in here after her death and try to charge her with fraud for doing something which she probably didn't understand.

That is the feeling I have about this case. \* \* Finding against the complainant; bill dismissed for want of equity."

After carefully considering the evidence introduced in the chancery cause, we are of the opinion that the court's statements and findings in the decree are sustained by the evidence. and we are also of the opinion that the above quoted statement of the court, as to what occurred just prior to the insured's signing and delivering of the application, is also sustained by the evidence.

In urging a reversal of the decree, as entered in the chancery cause, counsel for the Insurance Co. contend in substance that in an equitable action to cancel a life insurance policy upon the ground of false representations of facts material to the risk appearing in the insured's application, such cancellation should be decreed where it appears that the representations are false in fact, even though it also appears that they were not knowingly or fraudulently made by the insured. We are of the opinion that the contention is lacking in substantial merit in view of the provisions of the policy and the evidence. (See Raymer v. Modern Brotherhoods, 157 Ill. App. 510, 519-20; Joseph v. New York Life Ins. Co., 219



It was a beautiful day and the weather was just what we needed. We went for a walk in the park and saw many beautiful flowers. The children were very happy and played for hours. We also had a picnic under a big tree. It was a very pleasant surprise and we all enjoyed it very much. The food was delicious and the atmosphere was perfect. We will definitely go back soon.

I think it was very much like that. I think it was very much like that.

[illegible]

There is no evidence that the defendant was involved in the activities of the defendant's organization, and the defendant's activities were not in violation of the law.

[illegible]

is within a reasonable time, as required in the  
 contract, and the Government is not bound to  
 pay for an indefinite period to cancel a title insurance policy upon  
 the ground of false representations of facts material to the risk  
 assumed in the insurance, such cancellation should be  
 made within a reasonable time after the representations are found to be  
 false. It is held that the representations are false in fact  
 and that the policy is void ab initio and that the  
 title insurance company is not bound to pay for the policy.  
 The court is divided in its opinion as to the  
 effect of the finding in the case of the Government  
 in the case of the title insurance company.

Ill. App. 452, 466-7, affirmed in 30 Ill. 93.)

As to what occurred in court in the assumpsit suit on June 6, 1933, subsequent to the entry of the decree in the chancery suit, the bill of exceptions discloses in substance: That the superior court was fully advised by statements of opposing counsel as to the purport of said decree, and as to the contentions made in that suit by the Insurance Co. for the cancellation of the policy, which were substantially the same as stated in said notice of "special matters of defense" filed in the assumpsit suit; that the court expressed the opinion that, as the issues raised had been adjudicated and settled adversely to the Insurance Co., and as it had not at first pleaded in the assumpsit suit any defense to the merits but had only pleaded the pendency of the chancery suit as a bar to the assumpsit suit, it was now too late to raise the same issue in the assumpsit suit; that the attorney for the Insurance Co. contended in substance that, as an appeal had been taken to this appellate court from the decree rendered in the chancery suit and said decree might be reversed, no further action should be taken in the assumpsit suit until this appellate court had rendered a decision; that said attorney presented and asked leave to file an "additional plea," which leave the court refused; that this additional plea contained substantially the same allegations as were contained in the affidavit of the "Special Matters of Defense" previously presented, and the further allegation that said chancery suit and injunction "are still pending and undisposed of" (which was not the fact); that it was not disputed on said hearing that the amount of the policy sued upon was \$2,000 and that the accrued interest thereon amounted to about \$400; and that, finally, the superior court entered said order on June 6, 1933, that said amended plea of the Insurance Co., filed April 27, 1933, "be stricken for want of a sufficient affidavit of special defenses", that the default of the Insurance Co. be entered, that







"after hearing allegations and proofs submitted," plaintiff's damages be assessed at \$2400, and that judgment in that sum be entered against the Insurance Co.

As grounds for a reversal of said judgment in the assumpsit suit, counsel for the Insurance Co. contend that the court erred in striking said amended plea of special matters of defense of February 28, 1931, and defaulting the Insurance Co., because a plea of the general issue also was on file and such a plea is not subject to demurrer, and also make other contentions which we deem to be of a technical nature. We find no substantial merit in the contentions, in view of the fact that the real issue involved in both suits was decided after a full hearing adversely to the Insurance Co., by the decree entered in the chancery suit, and no different issue was presented for decision in the assumpsit suit, and in view of the further fact that no trial by a jury was demanded by the Insurance Co. in the assumpsit suit. It may be, as suggested by counsel for the Insurance Co., that the named beneficiary in the policy (defendant in the chancery suit) should have prayed by crossbill filed in that suit such affirmative relief as would have warranted the chancery court in awarding to her a money decree against the Insurance Co. for the amount of the policy and interest. However, she did not do this, but sought that same relief by the resumed prosecution of her pending assumpsit suit, in which suit the Insurance Co. did not raise any issues other than those which had been decided adversely to it in the chancery suit. And we are of the opinion, under the circumstances disclosed, that the court in the assumpsit suit did not err in entering its order of June 6, 1933, appealed from, wherein it defaulted the Insurance Co. for reasons stated, and entered the finding and judgment against it for \$2,400, and that said judgment should be affirmed. For the reasons indicated, the decree of the circuit court, entered April 3, 1933, is affirmed, and the judgment of the superior court, entered June 6, 1933, is also affirmed.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

On November 11, 1944, the following information was received from the Bureau of the Census, Washington, D. C.:

the Institute of

[illegible]

4. 1990年12月，在《中国环境报》上，刊登了“中国环境状况”一文，文中指出，中国环境状况不容乐观，环境污染严重，生态破坏加剧，环境管理亟待加强。

37042

KAZIMIERA TOMASUN,  
Appellee,

v.

THE WESTERN AND SOUTHERN  
LIFE INSURANCE CO., a  
corporation,  
Appellant.

23  
7  
APPEAL FROM SUPERIOR  
COURT, COOK COUNTY.

274 I.A. 654<sup>1</sup>

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

The present appeal from a judgment of \$2400, rendered by the superior court of Cook county against the Insurance company on June 6, 1933, was, upon motion of the company and by order of this court, consolidated for hearing with the appeal (Case No. 36839) of the company from a decree of the circuit court of Cook county, entered April 3, 1933, dismissing for want of equity the company's bill in chancery against said Kazimiera Tomasun. We have this day filed an opinion in case No. 36839, affirming the dismissal of said bill for want of equity, and in that opinion we have stated our reasons why said judgment of \$2400 also should be affirmed.

For the reasons stated in said opinion, to which reference is made, said judgment of the superior court for \$2400, rendered against the Insurance Company on June 6, 1933, is affirmed.

ATTORNEYS.

Sullivan, P. J., and Scudlan, J., concur.



1000

RECEIVED  
JAN 10 1964

THE  
FEDERAL BUREAU OF INVESTIGATION  
U. S. DEPARTMENT OF JUSTICE  
WASHINGTON, D. C. 20535

RECEIVED  
JAN 10 1964

84-1A-684

RE: JAMES EARL RAY, ALIAS; THE CRIME OF THE SOUTH.

The instant appeal from a judgment of \$4000, rendered by the Superior Court of Cook County against the respondent company, on June 4, 1963, was, upon motion of the company and by order of the court, communicated for hearing with the appeal (Case No. 1000) of the company from a decree of the circuit court of Cook County, entered April 2, 1963, dismissing for want of equity the company's bill in equity against said defendant company. To have this bill on appeal in case No. 1000, dismissed the dismissal of this bill the court of equity and in this opinion we have stated as follows: The bill of equity of 1963, also should be affirmed. The two appeals filed in this opinion, in 1963, rendered by the Superior Court of Cook County for \$4000, rendered final the respondent company on June 4, 1963, is affirmed.

WITNESSED my hand and seal of office at Chicago, Illinois, this 10th day of January, 1964.

36776

CLARA C. GICHAU, for use of  
FREDERICK W. CLARE,  
Appellant,

v.

FIRST UNION TRUST & SAVINGS  
BANK, a corporation, Garnishee,  
Appellee.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

274 I.A. 654<sup>2</sup>

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An appeal from a finding and judgment discharging the garnishee. Clare, the beneficial plaintiff (hereinafter called plaintiff), obtained a judgment for \$3,300 against Clara C. Gichau. The instant garnishment proceedings were afterward started against First Union Trust & Savings Bank, a corporation (hereinafter called the garnishee.) The answer of the garnishee states that at the time of the service of the writ it was not indebted to Clara Gichau, nor did it have in its possession any rights, credits, choses in action, effects, estate, property or moneys belonging to her, save that "it has a joint account in the name of Clara C. or Adolph Gichau, \* \* \* having a present balance of \$3.03 subject to withdrawal by either, and which this garnishee states is not subject to garnishment herein." The answer was contested and the cause was tried by the court. Counsel for the garnishee, at the outset of the hearing, stated that the garnishee bank had in its possession a trust fund amounting to \$1,900, which had been deposited in five installments by Clara Gichau and for which she had been given written receipts. The sole issue tried was the nature of this fund, plaintiff stating, in his brief, that "no point is raised on the pleadings."





Plaintiff states his theory as follows: That the garnishee "became Clara C. Gichau's agent to pay out certain funds deposited by her to the owners and holders of certain first mortgage bond interest coupons which were at that time due and payable. The sums of money deposited were in the form of a special or specific deposit which, when an entire sum had accumulated sufficient to pay said mortgage interest, was to be paid by the bank to the owners and holders of interest coupons who would present the same. There were two definite conditions or events which must happen before the bank could properly pay out the funds theretofore deposited. The first of these conditions was that the entire sum necessary to pay all interest then due and payable had been accumulated by deposits to be made by Mrs. Gichau. The second of these conditions was the extension of the maturity of the principal of her indebtedness and the reduction of the interest rate in connection with said indebtedness which was secured by the trust deed to certain premises \* \* \* to the State Bank of Chicago, as trustee. Neither of said conditions took place. The garnishee bank acting in the capacity of an agent for Mrs. Gichau, the depositor, and the deposit itself being a specific deposit for a specific purpose to be paid out by the bank as her agent on the happening of certain conditions, permitted Mrs. Gichau to revoke her instructions of payment and demand the return of the sums of money theretofore deposited at any time. Mrs. Gichau \* \* \* had a legal right to the sum deposited with the bank and therefore the plaintiff \* \* \* has a legal right to funds which still remain in the hands of the bank. There is only one question in this case, and that is whether or not the bank at the time of the service of summons in the attachment suit, had funds in its hands belonging to or to which Clara Gichau, the judgment debtor, had a right."

plaintiff states his theory as follows: That the  
plaintiff, James O. Wilson, is not a party to the  
funds deposited by her in the account and holders of certain first  
mortgage bond interest coupons which were at that time due and  
payable. The sums of money deposited were in the form of a  
special or specific deposit which, when an entire sum had accumulated  
sufficient to pay said mortgage interest, was to be paid by the  
bank to the owner and holder of interest coupons who would  
present the same. There were two definite conditions or events  
which must happen before the bank could properly pay out the  
funds theretofore deposited. The first of these conditions was  
that the entire sum necessary to pay all interest then due and  
payable had been accumulated by deposits to be made by Mrs. Wilson.  
The second of these conditions was the expiration of the maturity  
of the principal of her indebtedness and the reduction of the  
interest rate in connection with said indebtedness which was  
provided by the first deed as certain premises " " as the State  
Bank of Chicago, as trustee. Neither of said conditions took  
place. The plaintiff bank acting in the capacity of an agent for  
Mrs. Wilson, the depositor, and the deposit itself being a specific  
deposit for a specific purpose to be paid out by the bank as her  
agent on the expiration of certain conditions. Wilson  
in violation her instructions of payment and demand the return of the  
sums of money theretofore deposited at any time. Mrs. Wilson  
had a legal right to the sum deposited with the bank and therefore  
the plaintiff " " has a legal right to funds which still remain  
in the hands of the bank. There is only one question in this  
case, and that is whether or not the bank at the time of the service  
of summons in the attachment suit, had funds in its hands belonging  
to or to which Mrs. Wilson, the judgment debtor, had a right."



The garnishee contends that Clara Sichau placed the fund in its hands for the specific purpose of paying the past due interest coupons which she owed, that she thereby created a trust in favor of the coupon holders and they became the beneficial owners of the fund, and that the garnishee, as trustee, is bound to see that the purposes for which the trust was created are carried out.

No propositions of law or fact were submitted to the trial court and this appeal presents but a single question, viz: Is there sufficient evidence in the record to support the general finding made by the court? The burden was, of course, upon the execution creditor to prove that the fund was subject to garnishment. (See Manowsky v. Conroy, 33 Ill. App. 141, 143, and cases cited therein.) The burden of proof is on the plaintiff in garnishment to establish a garnishable debt. (Harrie v. Montag, 247 Ill. App. 89.)

Plaintiff, in his argument, assumes a number of facts not sustained by the evidence. On February 7, 1927, Clara C. and Adolph Sichau executed a trust deed to State Bank of Chicago to secure a bond issue of \$125,000 upon certain property commonly known as the Pine Grove Apartments. That bank was thereafter consolidated with Foreman Trust & Savings Bank and the consolidated bank took the name of Foreman-State Trust & Savings Bank. In June, 1931, the garnishee bank guaranteed the deposits of Foreman-State Trust & Savings Bank and the assets of the latter "were pledged to the First Union Trust & Savings Bank, and the remaining business of the Foreman Trust & Savings Bank was moved to the First National Bank Building \* \* \* and the First Union Trust & Savings Bank endeavored to proceed to collect the principal and interest for bondholders and holders of mortgages that were then outstanding," including the principal and interest on the Pine Grove Apartments bond issue. On



[illegible]

February 7, 1932, interest fell due on that issue and was not paid. Thereafter Clara C. Gichau made five deposits, aggregating \$1,900, with the garnishee, and she received from it the following receipts:

"First Union Trust and Savings Bank  
Chicago, Illinois  
Real Estate Loan Department

Chicago, Illinois, 3-10-32

Received from Clara C. Gichau check for \$500.00 to apply on interest due 2-7-32 on FS15286

\$500.-

First Union Trust and Savings Bank  
By E. Thurn"

"First Union Trust and Savings Bank  
Chicago, Illinois  
Real Estate Loan Department

Chicago, Illinois, 4-1-32

Received from A. Gichau check for \$300.- to apply on F S - 15286

\$300.-

First Union Trust and Savings Bank  
By E. Fields"

"First Union Trust and Savings Bank  
Chicago, Illinois  
Real Estate Loan Department

Chicago, Illinois, 4-15-32

Received from Clara C. Gichau check for \$300.- as part payment of interest due 2-7-32 on F S - 15286

\$300.-

First Union Trust and Savings Bank  
By E. Fields"

"First Union Trust and Savings Bank  
Chicago, Illinois  
Real Estate Loan Department

Chicago, Illinois, 4-2-32

Received from Clara C. Gichau check for \$400.- as part payment of interest due 2-7-32 on F S - 15286

\$400.-

First Union Trust and Savings Bank  
By E. Fields"

"First Union Trust and Savings Bank  
Dearborn, Monroe and Clark Sts.  
Chicago, Illinois

Received remittance (which is accepted subject to final payment in cash or solvent credit in accordance with the notice printed on reverse side hereof) to apply on account of principal and/or interest on item due as follows on account of real estate

February 7, 1932, interest paid on this loan and was not paid.  
Received from U. S. Union Trust and Savings Bank  
with the principal, and also received from it the following receipts:  
"Three Union Trust and Savings Bank  
Chicago, Illinois  
Local Federal Reserve Bank

Chicago, Illinois, 2-1-32  
Received from U. S. Union Trust and Savings Bank  
on interest due 2-1-32 on \$1000.00

Three Union Trust and Savings Bank  
By E. E. E. E. E.

"Three Union Trust and Savings Bank  
Chicago, Illinois  
Local Federal Reserve Bank

Chicago, Illinois, 2-1-32

Received from U. S. Union Trust and Savings Bank  
on interest due 2-1-32 on \$1000.00

Three Union Trust and Savings Bank  
By E. E. E. E. E.

"Three Union Trust and Savings Bank  
Chicago, Illinois  
Local Federal Reserve Bank

Chicago, Illinois, 2-1-32

Received from U. S. Union Trust and Savings Bank  
on interest due 2-1-32 on \$1000.00

Three Union Trust and Savings Bank  
By E. E. E. E. E.

"Three Union Trust and Savings Bank  
Chicago, Illinois  
Local Federal Reserve Bank

Chicago, Illinois, 2-1-32

Received from U. S. Union Trust and Savings Bank  
on interest due 2-1-32 on \$1000.00

Three Union Trust and Savings Bank  
By E. E. E. E. E.

"Three Union Trust and Savings Bank  
Chicago, Illinois  
Local Federal Reserve Bank

Received from U. S. Union Trust and Savings Bank  
on interest due 2-1-32 on \$1000.00



mortgage on property at 3919 Pine Grove Av

Loan No. F S - 15286

Due Date 2-7-32

Maker Gichau

To Apply on Principal

To Apply on Interest

Total Remittance

\$ 400- \$ 400-

Clara C Gichau  
2729 Pine Grove Av  
Chicago Ill

Date 5-27-32

First Union Trust and Savings Bank  
Chicago, Illinois

By E Fields

Collection Teller.

Partial Payment Receipt"

On the back of the trust deed from the Gichaus to State Bank of Chicago appears the following: "F. S. 15286." Clara Gichau, the sole witness called by plaintiff, testified that "the money was deposited towards interest on a loan." Q. (by the court) Did you deposit this money in the account as a depositor for the purpose of saving the money, or for the specific purpose of paying the interest on these bonds? A. I deposited it just exactly what the receipts called for. Q. (by counsel for plaintiff) Mrs. Gichau, will you tell the Court exactly the understanding with which you deposited this money? What was the agreement that you had with the bank in respect to depositing--? A. The idea-- It was a bond issue, your Honor. I was in default. I wanted the bank to make an extension of the loan. I had some money. I asked them, "Will you let me take this money and pay it to the bondholders and extend the principal payment?" That was the advice given me by a great many people. The Court. Q. You gave this money to the bank for the purpose of paying the interest on these bonds, is that correct? A. Yes, when I took the money that I had and I applied it to principal instead of interest, and the rest of the money went toward interest, and it was not sufficient. Q. (by counsel for plaintiff) Did you tell the Bank at that time just why you were leaving the money with them? A. I did not make any

NOTED BY THE BANK OF THE CITY OF CHICAGO

CHICAGO, ILL. 1911

TO THE BANK OF THE CITY OF CHICAGO

CHICAGO, ILL. 1911

CHICAGO, ILL. 1911

On the 1st day of the month of January, 1911, the undersigned, being duly sworn, depose and say that the money was deposited towards interest on a loan, and (by the court) Did you deposit this money in the account on a deposit for the purpose of saving the money, or for the purpose of paying the interest on these bonds? A. I deposited it just exactly what the interest called for. (By counsel for Plaintiff) Now, did you call the bank and say that you were depositing with which you deposited this money? That was the agreement that you had with the bank in respect to depositing? A. The bank-- It was a bond issue, your honor. I was in default. I wanted the bank to take an extension of the loan. I had some money. I asked them, "Will you let me have this money and pay it to the bondholders and extend the principal payment?" That was the advice given me by a trust company. The Court. (The Court said this money is the bank for the purpose of paying the interest on these bonds, is that correct? A. Yes, when I told the money that I had and I applied it to principal instead of interest, and the rest of the money went towards interest, and it was not sufficient. (By counsel for Plaintiff) Did you call the bank at that time and say you were leaving the money with them? A. I did not make any



statement to that effect." She admitted that the only moneys she ever paid on account of the interest in question was by way of the said deposits. The garnishee called as a witness P. G. Guthridge, an assistant manager of its real estate loan department, and in connection with his testimony introduced a photostatic copy of the Gichau trust deed. Mr. Guthridge testified, inter alia, that the trustee in that trust deed was no longer doing business and that the garnishee was trying to collect the money under the trust deed for the bondholders; that he talked with Clara Gichau on or about February 7, 1932, in reference to the depositing by her of the fund in question; that "she said she was paying this money on account of the interest that fell due. \* \* \* She said she was going to turn money over every month and endeavor to pay her obligations. \* \* \* She wanted the bank to endeavor to waive the principal payment, or extend the principal payment. Q. What did you tell her? A. I told her that was not possible, that it is being worked through a bondholders committee. \* \* \* She said she wanted to continue making the payments as many others did. Q. (by counsel for plaintiff) Let's have the terms of that agreement. A. The payments-- She was going to make payments each month to pay her obligation, to avoid it being referred to a bondholders committee. Q. That is all she told you? That is the agreement? A. That is the basis on which she was making the deposit. \* \* \* I am one of the officers, just assistant manager of the Real Estate Loan Department, in an effort to collect the money for holders to-- \* \* \* Q. What were you supposed to do with this money again? A. We were holding it until the interest and principal which fell due had been paid, then would remit it to the bondholders. Q. In other words, the understanding you had was this. \* \* \* if I understand properly, that she had interest coming due, she was going in, making payments due from time to



statement to that effect." The witness said the only money  
she ever paid on account of the interest in question was by way  
of the said deposit. The witness said as a witness T. B.  
Guthrie, an assistant manager of the Real Estate Loan Depart-  
ment, and in connection with his testimony introduced a photostatic  
copy of the witness's letter. The letter was dated, in part,  
saying that the interest in that loan does not no longer being  
business and that the witnesses was trying to collect the money  
under the first deed for the bondholders; that he talked with  
T. B. Guthrie on or about February 7, 1935, in reference to the  
depositing of part of the fund in question; that she said she was  
paying this money on account of the interest that fell due. " " "  
The witness said she was going to come money every month and endeavor  
to pay her obligation. " " " She wanted the bank to endeavor to  
waive the principal payment, or extend the principal payment. " "  
That she told him that she was not possible. " "  
That it is being worked through a bondholders committee. " "  
The witness said she wanted to explain to the witnesses as well as  
the. (by counsel for plaintiff) Let's have the terms of that  
agreement. A. The agreement-- she was going to make payments  
each month to pay her obligation, to avoid it being related to  
a bondholders committee. Q. That is all she told you that is  
the agreement? A. That is the basis on which she was making the  
deposits. " " " I am one of the officers, first assistant manager  
of the Real Estate Loan Department, in an effort to collect the  
money for holders to-- " " " That was your suggestion to do  
with this money? A. It was nothing to make the interest  
and principal which fell due and was paid, then would come it  
in the bondholders. " " " In other words, the understanding you  
had was that " " " It is understood generally that the Real Estate  
Loan Department, she was going to, making payments two from time to

time, and that money you were going to pay to the bondholders?

A. The payment was made after the interest was due, and to avoid foreclosure action here. She was making payments on account of the interest on items that were past due. Q. Did you pay it out according to your understanding? A. We had no understanding. It was not to be paid out until the interest was paid in full.

Q. Did you pay it out at any time? A. It has not been paid in full." The witness further testified that shortly after the assets of Foreman-State Trust & Savings Bank had been pledged to the garnishee "it was apparent that there would be a default under quite a few of the bond issues that had been issued at the State Bank of Chicago" and that, following the custom that prevailed when banks ceased to operate, a bondholders committee was formed by certain members of Foreman-State Trust & Savings Bank in connection with the Chicago Title & Trust Company. "Q. (by attorney for plaintiff) Did you turn the money over to them? A. No, sir. We are holding the money to await the decision from them as to the desire of the bondholders, or Court action through the foreclosure proceedings. \* \* \* Q. (by plaintiff's counsel) As a matter of fact, Mr. Guthridge, the only interest you had in this entire matter is exactly what you have said here, that Mrs. Sichau came to you and deposited this money with you and you were to pay it out on this past due interest. That is the only connection you had in this entire matter, is it not? A. That was our attitude." The witness further testified that the fund in question was not subject to the check of Clara Sichau and that the garnishee bank expected to pay the fund to the bondholders.

It is clear from the bill of exceptions that the trial court was of the opinion that the evidence was not sufficient to warrant a finding that the funds in the garnishee bank were subject to garnishment, and after a careful consideration of all the oral

time, and that money you were going to pay to the bondholders.  
A. The payment was made after the interest was due, and to avoid  
foreclosure action here. Q. Was making payments on account of  
the interest on them that were past due. A. Did you pay it and  
according to your understanding. A. We had no understanding.  
It was not to be paid and until the interest was paid in full.  
Q. Did you pay it out of any thing. A. It has not been paid in  
full. The witness further testified that shortly after the  
closure of Farmers-Union Trust & Savings Bank had been pledged to  
the guarantee "It was apparent that there would be a default under  
either a law of the bond issue that had been issued at the State  
Bank of Chicago" and that following the action that provided when  
bank failed to operate a bondholders committee was formed by  
certain members of Farmers-Union Trust & Savings Bank in connection  
with the Chicago Title & Trust company. Q. (By attorney for  
plaintiff) Did you turn the money over to them. A. No, sir.  
We are holding the money to await the decision from them as to the  
desire of the bondholders or Court action through the foreclosure  
proceedings. Q. (By plaintiff's counsel) As a matter of  
fact, Mr. Gentry, the only interest you had in this matter was  
in security what you have said here, that Mrs. William came to you  
and deposited this money with you and you were to pay it out on this  
first due interest. That is the only connection you had in this  
matter, is it not. A. That was not correct. The witness  
further testified that the fund in question was not subject to the  
check of these claims and that the guarantee bank requested to pay  
the fund to the bondholders.  
It is clear from the bill of exceptions that the trial  
court was of the opinion that the witness was not entitled to  
present a finding that the funds in the guarantee bank were subject  
to redemption, and after a careful consideration of all the oral



and documentary evidence, we feel that we would not be justified in disturbing the finding of the trial court. The burden was upon plaintiff to establish a garnishable debt, and when the entire evidence is carefully analyzed the contention of plaintiff that the evidence proves clearly that "there were two definite conditions or events which must happen before the bank could properly pay out the funds theretofore deposited," is not satisfactorily sustained by the proof. Plaintiff cites a number of cases which would be applicable if his contention that "there were two definite conditions or events which must happen before the bank could properly pay out the funds theretofore deposited," were sustained by the proof.

Plaintiff contends that Meyers v. Rifkin, 263 Ill. App. 634 (Abst.), recently decided by this division of the court, absolutely controls the instant appeal, and in his favor. There it appeared that the bank, at the time of the deposit made by Rifkin, stated, in a letter, that the deposit was made for the purpose of having the bank distribute the same to Heitman Trust Co., in connection with the first mortgage on the premises in question; that such payment was "subject to the understanding that the said mortgage shall be extended for a period of two years," and that such extension "shall be subject to unpaid general taxes and special assessments;" and the evidence established that the negotiations as to the proposed extension of the mortgage had failed and ceased, and we held that under such circumstances Rifkin could properly have demanded the repayment to him of the deposit and that therefore it would be subject to garnishment by his judgment creditors. Hogers Locomotive & Machine Works v. Kelley, 98 N. Y. 234, is applicable to the facts of the instant case and sustains the judgment of the trial court. There the court, after holding that the bank held the fund in trust, said:

"If the creditors refused to assent to the trust, or if

and documentary evidence, we find that we would not be justified in disturbing the finding of the trial court. The burden was upon plaintiff to establish a prima facie case, and when the entire evidence is carefully analyzed the contention of plaintiff that the evidence proves that "there were two definite conditions or events which must happen before the bank could properly pay out the funds heretofore deposited," is not satisfactorily sustained by the proof. Plaintiff also a number of cases which would be applicable to his contention that "there were two definite conditions or events which must happen before the bank could properly pay out the funds heretofore deposited," was introduced by the proof. Plaintiff contends that "there is nothing in the law, and the law (that), namely, justice by this division of the court, upon which plaintiff contends the funds should, and in his favor. There is no appearance that the bank, at the time of the deposit made by plaintiff, stated, in a letter, that the deposit was made for the purpose of having the bank distribute the same to William Grant Co., in connection with the time payment on the mortgage in question; that such payment was "subject to the understanding that the said mortgage shall be extended for a period of two years," and that such extension "shall be subject to equal annual interest and equal payments," and the evidence established that the mortgage was on to the proposed extension of the mortgage had failed and ceased, and we hold that under such circumstances plaintiff could properly have demanded the payment to him of the deposit and that therefore it would be subject to extension by his judgment and action, and the facts of the deposit were and remain the judgment of the trial court. There is no other matter that the bank held the funds in trust, and:

"If the condition referred to above is the exact, or is



their debts were otherwise satisfied, a trust would result to the corporation in respect to the unexpended balance in the hands of the trustees. But so long as the trust was continuing, the sheriff's right, under the attachment, if any, was subordinate to the rights of the holders of coupons to have the fund applied to their liquidation, although the coupons had not been presented when the attachment was levied, and the existence of the trust was not then known to the holders. The coupon holders were creditors of the company. The fund in question was raised to pay the coupons. The corporation had a right to make the arrangement in question to prevent a default in meeting the interest on its bonds, and the arrangement made was, we think, effectual in law, as against the claims of other creditors."

The sole answer made by plaintiff to that important case is that it there appears that the purpose for which the deposit was made "was still alive and capable of performance. Whereas in the instant case the purpose for which the deposit was made was incapable of performance." Had plaintiff, in the instant case, proven that the garnishee could not perform the purpose of the deposit, a different situation would be presented. We cannot sustain the further argument of plaintiff that there is sufficient evidence to indicate a disclaimer on the part of the bondholders. If the record is practically barren as to the attitude of the bondholders in respect to the fund, the fault lies with him. Even after all the evidence had been presented and the court had stated that he was satisfied that it was his duty to make a finding for the garnishee, counsel for plaintiff stated that he wished to offer additional proof, and, thereupon, the court continued the further hearing for a number of days for the sole purpose of giving plaintiff an opportunity to offer additional proof, but when the hearing was resumed counsel announced that he had no further evidence to offer. The attitude of the garnishee in reference to the fund in question was plainly stated by Frank L. Paul, one of its counsel, who informed the court that the garnishee bank regarded the fund as belonging to the bondholders and that the only reason why it had not been paid over to them was because the amount of the fund was sufficient to make only partial payments on the coupons held





by all the bondholders. Any suggestion that the garnishee was actuated by improper or selfish motives in its attitude as to the nature of the fund is wholly unwarranted.

Plaintiff urges that he had the right to reach the funds in question because there had been no acceptance of the trust by the beneficiaries. Regers Locomotive & Machine Works v. Kelley, supra (p. 238), disposes of that contention and adversely to it.

Plaintiff argues, as we understand it, that the case should have been determined upon the receipts given Clara Gichau and upon her testimony that she had deposited with the garnishee bank the amounts stated in the receipts, and that the evidence offered by the garnishee tending to show the nature and purpose of the transaction violates the Statute of Frauds. It is a sufficient answer to this contention to say that counsel for plaintiff questioned Clara Gichau as to the understanding and agreement she had with the garnishee when she deposited the money, and he cross-examined Guthridge fully as to the said agreement and understanding. The instant contention that such evidence violates the statute of Frauds was not raised during the hearing and is plainly an afterthought. In any event, there is no merit in it. The assumption in the instant contention that the testimony of Clara Gichau made out a prima facie case for plaintiff is unwarranted.

In conclusion, we may state that if in any further proceeding it appears that the bondholders have refused to assent to the trust, or if their debts were otherwise satisfied, or if it should appear that it was not possible for the garnishee to carry out the purposes of the trust, a trust would then result to Clara Gichau in respect to the fund in question.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.



by all the beneficiaries. Any suggestion that the beneficiaries were  
affected by interest or selfish motives in the evidence as to the  
nature of the fund is wholly unwarranted.

Plaintiff argues that he had the right to reach the funds  
in question because there had been no suggestion of the fact by  
the beneficiaries. Plaintiff's Motion for a Decree in the Matter of the  
Trust of 1901, Chapter of that evidence was submitted to the  
Court. Plaintiff argues, as we understand it, that the case  
should have been determined upon the receipts given to him  
and upon her testimony that she had deposited with the trustees  
back the amounts noted in the receipts, and that the evidence  
offered by the trustees tending to show the nature and purpose of  
the transactions violated the terms of the trust. It is a well known  
maxim in this jurisdiction to say that counsel for plaintiff presented  
Clare Wilson as to the understanding and agreement she had with the  
trustees when she deposited the money, and the correspondence  
concerning fully as to the agreement and understanding. The  
trustees contended that such evidence violated the terms of  
the trust and was not admissible. The hearing and the ruling in  
this respect. In my opinion, there is no error in this. The contention  
is the instant contention that the testimony of Clare Wilson was  
and a trust case for plaintiff is unwarranted.

In conclusion, we may state that it is our further pro-  
vision is obvious that the beneficiaries have refused to accept to  
the trust. It is not possible for the trustees to deny  
should appear that it was not possible for the trustees to deny  
but the purpose of the trust, a trust would then result to Clare  
Wilson in respect to the fund in question.

The judgment of the Municipal Court of Chicago is affirmed.

CHIEF JUSTICE

CHIEF JUSTICE, U. S. DISTRICT COURT, S. D. CHICAGO



36795

BENJAMIN KAPLAN,  
Appellant.

v.

JACOB POLLACK, MINNIE POLLACK,  
ROSA BARON and PHILIP BARON,  
Appellees.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

274 I.A. 654<sup>3</sup>

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In an action of the first class, in the Municipal court of Chicago, plaintiff sued to recover upon certain bonds and has appealed from a ~~summary~~ judgment rendered against him in a trial by the court. Defendants have not filed a brief in this court.

The suit was instituted on four bonds of \$500 each, signed by defendants (appellees) and Harry E. and Esther Gordon, dated February 1, 1933, maturing February 1, 1934, and secured by a deed of trust on certain real estate. The statement of claim was filed on August 9, 1933. Upon leave given, an amended statement and affidavit of claim was filed on December 5, 1933. It is provided in the bonds that upon default in the payment of interest at the time and place specified the principal may at the election of the holder of any of said bonds become due and payable before its maturity, as provided in the trust deed and in accordance with the terms and provisions thereof. There is a provision in the trust deed to the effect that in case of default in the due and punctual payment of any interest due on any bond secured by said trust deed and any such default shall continue for a period of twenty days, then the whole of the principal sum secured by said trust deed, together with the interest accrued thereon, shall at once, without notice, at the option of the holder of



any one of said bonds then unpaid, become due and payable.

In their affidavit of merits filed to the amended statement of claim, defendants do not deny the execution of the bonds, nor do they claim payment of the interest; they allege that the bank which was the place of payment was closed and that no demand for payment had been made on them, but do not allege that they had tendered payment or that they had been or were ready, willing and able to make payment of interest that became due on August 1, 1932; they deny that there had been a default in payment of interest which had continued for a period of twenty days, and allege that plaintiff had no right to maintain his action on the bonds because of a provision in the trust deed that all right of action under the trust deed is vested in the trustee.

On January 3, 1933, upon motion of plaintiff, the suit was dismissed as to defendants Harry R. Gordon and Esther Gordon, and, upon the same day, the cause came on in regular course for trial, before the court without a jury, there having been no demand by either party for a jury, and the court heard the evidence and found the issues against defendants and assessed plaintiff's damages in the sum of \$3,060, and judgment was thereupon entered upon the finding. On January 20, 1933, upon an oral motion made by defendants, unsupported by affidavits or evidence, the court vacated the finding and judgment of January 3d. On March 1, 1933, when the cause again came on for trial, evidence was offered by plaintiff, but none by defendants, and the court found the issues against plaintiff.

At the outset of the hearing counsel for defendants objected to the introduction of any evidence by plaintiff upon the ground that if there was a default in the payment of interest due August 1, 1932, nevertheless, the trust deed provides that such



any one of said bonds from receipt, because the said bonds  
in their entirety of which filed to the undersigned defendant  
of claim, defendant do not deny the execution of the bonds, nor do  
they claim payment of the interest; they allege that the bank which  
was the place of payment was closed and that no demand for payment  
had been made on them, but do not allege that they had rendered  
payment or that they had been or were ready, willing and able to  
make payment of interest that became due on August 1, 1933; they  
say that there had been a default in payment of interest which had  
continued for a period of twenty days, and allege that plaintiff  
had no right to maintain his action on the bonds because of a  
provision in the bonds that they all right of action under the  
bonds had been vested in the trustee.  
On January 24, 1934, upon motion of plaintiff, the said  
was dismissed as to defendants Harry H. Gordon and Arthur Gordon,  
and, upon the same day, the same came on in regular court for  
trial, before the court without a jury, there having been no demand  
by either party for a jury, and the court heard the evidence and  
found the issues against defendants and assessed plaintiff's  
damages in the sum of \$1,000, and judgment was thereupon entered  
upon the finding, on January 24, 1934, upon the said motion made  
by defendant, accompanied by affidavit as aforesaid, the court  
ordered the finding and judgment of January 24, 1934, set aside  
upon the motion made by the said plaintiff, and the court found the issues  
against plaintiff, but none by defendant, and the court found the issues  
against plaintiff.  
At the outset of the hearing counsel for defendant  
objected to the introduction of any evidence by plaintiff upon the  
ground that it was not a contract in the nature of interest was  
against 14 USC, nevertheless, the court then granted that such

default should continue for a period of twenty days before plaintiff had the option to declare the whole of the principal sum secured by the trust deed, together with the interest accrued thereon, due and payable, and that as the suit was commenced and the original statement of claim filed on August 9, 1933, it was prematurely brought. The trial court sustained this contention, and plaintiff here insists that his action in that regard was erroneous. We agree with plaintiff.

Under the common law practice the prematurity of any action can be properly raised only by a plea in abatement unless the prematurity appears affirmatively on the face of the declaration, when it may be tested by demurrer. The office of a plea in abatement is to set up matter which merely defeats the present proceeding but does not show that the plaintiff is forever concluded, and it must give the plaintiff a better writ. Rule 12 of the rules of the Municipal court of Chicago (in force at the time) reads as follows:

"Where the defendant desires to set up matters in abatement or question the jurisdiction of the court, he shall present the same by a written motion specifying the grounds thereof, and support the same by an affidavit except where the matters relied on to support the motion appear of record. If such motion raises an issue of fact, deors the record the court shall hear evidence presented by the respective parties, provided, that if a jury be demanded the matter shall be set for an immediate hearing."

In the instant case defendants did not file a written motion in accordance with rule 12, nor did they make a motion to strike, but they saw fit to file an affidavit of merits to the amended statement of claim which had been filed long after the twenty-day period had passed. It is the settled rule of law in this state that where a party elects not to abide by his original declaration and files, upon leave given, an amended declaration, he abandons his original declaration and the suit is regarded as having been commenced at the time of filing the amended count.

believe should continue for a period of twenty days before which  
fill had the option to exercise the whole of the principal sum  
secured by the trust deed, together with the interest accrued  
thereon, due and payable, and that as the said was commenced  
and the original statement of claim filed on August 1, 1901, it  
was promissorily binding, the said court holding that the  
condition and plaintiff here insists that his action in that  
respect was premature. The court gave judgment.

Under the common law practice the promissory of any  
action can be impeached within six years in certain cases  
the promissory appears affirmatively on the face of the declaration,  
when it may be treated as a bar to the action. The effect of a plea in abate-  
ment is to set up matter which merely defeats the present proceeding  
but does not show that the plaintiff is forever barred, and it  
must give the plaintiff a better title. Rule 18 of the rules of  
the Municipal Court of Chicago (in force at the time) reads as

follows:

"Where the defendant declares to set up matter in  
abatement or to question the jurisdiction of the court, he shall  
present the same by a written motion specifying the grounds  
thereof, and support the same by an affidavit sworn before the  
court, which is to be made at the hearing of the motion. If  
such motion is made on issue of fact, the court may  
order that the matter be referred to the jury for their  
determination, and if it is a fact or question of law shall be  
decided by the court."

As the plaintiff was informed that this is a written motion he  
submitted this rule, and the court held that it was not  
binding on him, and that he was entitled to move for the  
dismissal of the action and that the court was not bound  
by the rule. It is the settled rule of law in this  
State that where a party claims not to be bound by his pleading,  
he is entitled to his original declaration and the rule is regarded as  
having been removed at the time of filing the motion.



It is unnecessary to cite the numerous authorities which sustain this familiar principle of law. Under the state of the record it is clear that the trial court erred in holding that plaintiff could not recover on the ground that the suit was prematurely brought, and in arriving at this conclusion we have assumed, solely for the purposes of this appeal, that the twenty-day period provision in the trust deed controls the right of a holder of bonds to sue thereon in an action in assumpsit.

At the insistence of plaintiff the trial court allowed him to offer evidence in support of his claim, and we are satisfied, from a reading of the bill of exceptions, that he made out a prima facie case. Defendants offered no evidence.

At the conclusion of the hearing plaintiff submitted to the trial court certain propositions of law, all of which were marked "Overruled." From an inspection of the same it appears that the trial court misconceived the rules of law applicable to the instant case. He held, in effect, that the plaintiff was barred from maintaining the action on the amended statement of claim because the original statement of claim was filed prematurely. He marked "Overruled" the following proposition of law:

"The court holds as a matter of law that the bonds executed by the defendant and sued on herein by plaintiff are negotiable instruments."

The bonds contain a definite promise to pay to the order of bearer (or to the registered owner thereof) a fixed sum of money at a certain time and place. The references on the bonds to the trust deed do not make the bonds non-negotiable. (See Schatskin v. Rosenwald & Weil, 267 Ill. App. 169; Wright v. Stevens Brothers Corp., Can. No. 36,649 Ill. App. Ct.; Gause v. Simon, 268 Ill. App. 196; Pflueger v. Broadway Tr. & Bay. Bank, 351 Ill. 170; Fleming v. Cannon, 267 Ill. App. 163.) By marking plaintiff's proposition of law number five overruled, the court held, in effect, that certain provisions in



the trust deed barred plaintiff from maintaining the instant action. As we have heretofore pointed out, in Schatzkis v. Rosenwald & Weil, supra, and Bright v. Stevens Brothers Corp., supra, the purpose of such provisions was to restrict individual action only in the institution of foreclosure proceedings and not in the commencement of an action to recover upon a personal obligation of a signed note or bond secured by a trust deed.

The trial court, upon the undisputed facts, should have found for plaintiff. The judgment is therefore reversed and judgment is entered in this court against defendants, Jacob Pollack, Minnie Pollack, Rosa Baron and Philip Baron, for \$2,000, the amount of the bonds, plus interest, as provided therein, or a total of \$2,060.

REVERSED AND JUDGMENT IN THIS COURT  
AGAINST DEFENDANTS JACOB POLLACK,  
MINNIE POLLACK, ROSA BARON AND PHILIP  
BARON, FOR \$2,060.

Sullivan, P. J., and Gridley, J., concur.





36895

SAMUEL ROSEN,  
Appellant,

v.

NATIONAL TEA CO.,  
a Corporation,  
Appellee.

267  
APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

274 I.A. 654<sup>4</sup>

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

In an action for rent the trial court found for defendant and plaintiff has appealed from the judgment entered upon the finding.

The statement of claim alleges, in substance, that on February 7, 1931, a lease, for the premises known as 3218 Lawrence avenue, Chicago, for the term of one year commencing May 1, 1931, was entered into between plaintiff, as lessor, and defendant, as lessee, at a yearly rental of \$2,400, payable in monthly instalments, in advance, of \$200 each; that on April 21, 1932, before the expiration of the lease, plaintiff and defendant entered into a written agreement "extending the term of the aforesaid lease for the months of May and June, 1932, at the rental of \$200 per month;" that "said agreement further provided that all of the other terms and conditions of said lease should remain in full force and effect \* \* \*;" that thereafter defendant wrongfully held over during the month of July, 1932, and plaintiff elected to treat the holdover as creating an additional term for one year; that plaintiff sues to recover rent for the months of July, August and September, 1932, and that defendant is indebted to plaintiff in the sum of \$600 for rent for said months. The affidavit of merits admits the making of the lease and the agreement; admits that defendant occupied the premises during the

RECEIVED  
JANUARY 10 1934  
NATIONAL THEATRE  
A CORPORATION  
CHICAGO, ILL.

STANDARD THEATRE

CITY OF CHICAGO

274 I.A. 654

MR. JAMES MONROE DELIVERED THE JURY OF THE COURT.

IN AN ACTION FOR THE RECOVERY OF THE COST

OF THE PRODUCTION AND DISTRIBUTION OF THE FILMS

KNOWN AS THE "LIONEL LINCOLN"

THE PLAINTIFFS ALLEGED, IN SUBSTANCE, THAT ON

FEBRUARY 7, 1931, A LETTER WAS RECEIVED FROM THE DEFENDANT

ADVISING THAT THE DEFENDANT HAD BEEN ADVISED BY THE

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term of the lease and during the months of May and June, 1932, but denies that it continued in possession during the month of July; avers that it moved out on July 10, 1932; denies that plaintiff has the legal right to elect to treat the alleged holdover as creating a renewal of the term of said lease as extended, and denies that it became liable to pay plaintiff the sum of \$200 per month for the period of one year from July 1, 1932; alleges "that by holding over during the first ten days of July, 1932, said lease was extended for the term of two months only, \* \* \* and defendant avers that it has heretofore tendered and now tenders to the plaintiff the sum of \$400 in full satisfaction and payment of all rent due plaintiff by it." During the trial defendant filed an amended affidavit of merits in which it admits the making of the lease; avers that it moved out of the premises on July 10, 1932; denies that plaintiff has the legal right to elect to treat the alleged holdover as creating a renewal of the term of the lease as extended; denies that it is liable to pay plaintiff the sum of \$200 per month for the period of one year from July 1, 1932, and denies that it became or is a holdover tenant for any period of time.

The following is the agreement of April 21, 1932:

"2549 W. Division

"This Memorandum of Agreement made April 21st, 1932, by and between Samuel Rosen of Chicago, Illinois, first party, and National Tea Co., an Illinois Corporation, second party:

Witnesseth:

"Whereas, the first party is the Lessor and the second party is the Lessee in a lease covering premises situate at 3218 Lawrence Avenue for a term expiring April 30, 1932, at the monthly rental of Two Hundred Dollars (\$200.00), and,

"Whereas, it is the desire of the parties hereto to extend the term of this lease for the months of May and June of 1932 at the rental of Two Hundred Dollars (\$200.00) a month.

"Now, Therefore, it is agreed by and between the parties hereto as follows:

"First: That the term of the aforementioned lease between the parties hereto covering premises situated at 3218 Lawrence Avenue, Chicago, Illinois, be extended for the months of May and June, 1932, at the monthly rental





of Two Hundred Dollars (\$200.00).

"Second: That all of the other terms and conditions in said lease remain in full force and effect.

"In Witness Whereof, the parties hereto have executed this instrument the day and year first above written.

"(Signed) Samuel Rosen (Seal)

National Tea Co.

"(Seal)

"(Signed) Th Rasmussen"

It was stipulated that defendant remained in possession of the premises until "sometime between the tenth and the fifteenth of July, 1932." On July 11, 1932, a representative of defendant handed to plaintiff the following document with a request that he sign same:

"July 11th, 1932.

"National Tea Co.

"1000 Crosby St.

"Chicago, Illinois.

"Gentlemen,

"This is to acknowledge receipt from you of \$200.00 for the use and occupation of premises at 3218 Lawrence Ave., Chicago, Illinois, for the month of July, 1932.

"It is hereby distinctly acknowledged by me that your lease covering these premises expired on the 30th of April, 1932, and that you stayed there through the months of May and June under an extension agreement.

"I hereby agree that your remaining there for the month of July 1932 is as a tenant from month to month that it shall, under no circumstances, be considered a renewal of your lease and/or as creating a tenancy from year to year.

"I further acknowledge receipt from you of notice informing me that you are abandoning the premises on the 31st day of July, 1932, thereby terminating absolutely your tenancy.

"Yours very truly,

"This company hereby agrees to the terms of this letter.

"National Tea Co.

"(Signed) Th Rasmussen

Secretary."

Plaintiff refused to sign same and sent defendant the following letter:

"Chicago, Illinois,  
July 18, 1932.

"National Tea Company,

"1000 Crosby Street,

"Chicago, Illinois.



of two hundred dollars (\$200.00).  
"I am sorry that I am not able to pay the balance of the bill for the month of July, 1933, but I am sure that you will understand my position." (Signed) "James M. Jones" (Seal)

"I am sorry that I am not able to pay the balance of the bill for the month of July, 1933, but I am sure that you will understand my position." (Signed) "James M. Jones" (Seal)

It was explained that the balance of the bill for the month of July, 1933, was not paid because of the illness of the patient. The balance of the bill for the month of July, 1933, was not paid because of the illness of the patient. The balance of the bill for the month of July, 1933, was not paid because of the illness of the patient.

July 1933

"I am sorry that I am not able to pay the balance of the bill for the month of July, 1933, but I am sure that you will understand my position." (Signed) "James M. Jones" (Seal)

"I am sorry that I am not able to pay the balance of the bill for the month of July, 1933, but I am sure that you will understand my position." (Signed) "James M. Jones" (Seal)

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July 1933

"I am sorry that I am not able to pay the balance of the bill for the month of July, 1933, but I am sure that you will understand my position." (Signed) "James M. Jones" (Seal)

"I am sorry that I am not able to pay the balance of the bill for the month of July, 1933, but I am sure that you will understand my position." (Signed) "James M. Jones" (Seal)

July 1933

"I am sorry that I am not able to pay the balance of the bill for the month of July, 1933, but I am sure that you will understand my position." (Signed) "James M. Jones" (Seal)

"Gentlemen:

"A few days ago you left with me a letter dated July 11, 1932, addressed to yourselves with reference to the premises known as 3216 Lawrence Avenue, which you are now occupying as my tenant, and which letter you requested that I sign and return to you.

"When you retained possession of the premises beyond the expiration of the original lease and the extension thereof, I determined to treat you as a holdover tenant, and I am taking this opportunity of advising you of my election as to regard you.

"I shall, of course, continue to look to you for the payment of rental as provided for by the lease and extension for the balance of the term.

"Yours very truly,  
"S. Rosen"

It is undisputed that the letter of July 11 was signed by Rasmussen, the secretary of defendant.

It appears, from the bill of exceptions, that the trial court found for defendant upon the theory that the agreement of April 21 "killed" the written lease and created a new agreement by the terms of which defendant "would hold over for two months without obligating itself to go further than the two months." That the court erred in so holding is clear. As plaintiff contends, "the written agreement of April 21, 1932, was in legal effect an extension of the lease between the plaintiff and the defendant." It was made before the expiration of the lease, and the language used therein is plain and susceptible of but one construction. The lease was to continue in full force and effect, subject only to the modification that the term was extended for two months. It is, of course, the law that a landlord and tenant may enter into an agreement whereby the terms of the original lease may be changed. In DeFriest v. Bradley, 192 Mass. 346, the original lease, dated May 9, 1906, contained neither a covenant for a renewal nor an agreement for an additional term at the election of the lessee. On November 6, 1906, before the expiration of the term, the parties entered into the following agreement:

1. The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, regarding the land owned by the United States in the State of California:

anybody's business but to encourage people to work."

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

On January 24, 1964, the following information was received from the Bureau of the Census:

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and the other two are the same as the first two.

Source: *U.S. Census Bureau, 1960 Census of the United States, General Population and Housing Characteristics, Series PC80-1A, Table 100-1, "Total Population."*

10. The following information is for your information only. It is not to be used for any other purpose.

1944-1945

6. Continuation of the 1944-1945 season

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The focus was on countries in full-scale civil wars.

10/10/1961

Major and minor axis lengths of 1.00 and 0.00, respectively, indicate that the two variables are perfectly correlated.

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It's important to realize that the world is not a perfect place, and there are many things that we can do to make it a better one. We can start by being kind to each other, and by trying to understand the perspectives of others. We can also work to address the root causes of the problems that we face, such as poverty and inequality. By working together, we can make a difference in the world, and we can create a more just and equitable society for all.

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"It is hereby agreed that the term of a certain lease dated May 9, 1900, between Richards Bradley, trustee under the will of John B. Williams, as lessor, and William T. DeFriest, as lessee, shall be extended for the period of five years from the expiration thereof, so that the term of said lease as extended shall extend to and expire on the 30th day of April, 1910; and all provisions, agreements, terms and conditions in said lease and the assignment thereof to The William J. Kemp Brewing Company, which assignment is dated December 13, 1901, shall apply to said term as extended."

In the opinion of the court it is said (p. 351):

"It was, however, within the contractual power of the parties by a later arrangement to prolong the term although the lease was silent on this subject, and this was done by an instrument which has been referred to as the agreement of extension, which was executed and became operative before the term provided for in the lease had expired. In legal effect this agreement operated to extend the term as effectually as if its principal provision had been inserted in the lease in the form of an option of extension for a further definite period at the election of the lessee, who subsequently made such an election. By either way, then, the result is the same, for the original demise is thereby lengthened to cover the longest time named. The lease and the agreement, therefore, must be construed together and considered in their entirety as forming the contract between the parties."

See also Hartley v. Garsham, 196 N. Y. S. 401, 402; Klein v. Auto Parcel Delivery Co., 192 Ky. 583, 585; Tillney v. Knoblauch, 73 Minn. 108, 113; Miller v. Albany Lodge, 168 Ky. 755, 756. From the aforesaid cases, and many others that might be cited, it is clear that an extension of an original term is not a new demise but a continuation of the old one. The authorities point out that some courts recognize a technical difference between the effect of a stipulation for the "renewal" of a lease and one for its "extension," while other courts treat them as practically the same in legal effect, but they all hold that an agreement for an extension of the term is not a covenant to renew but a present demise which becomes operative immediately upon the exercise of the option conferred and takes effect at the expiration thereof and is subject to all the conditions and covenants of the original lease, and that no new lease or other writing is necessary to extend the term. By the agreement of April 21 the parties specifically provided for an "extension" of the term of the lease and that all the other conditions in the lease should

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is the opinion of the court as to whether or not it is

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1986, p. 2727. 1986, p. 2727. 1986, p. 2727. 1986, p. 2727. 1986, p. 2727.

Journal of Management Education 33(10) 1133-1147

*[Faint, illegible text at the bottom of the page]*

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It was found that the above information was not correct and that the information was false.

1994年12月25日

SECRET - NOFORN \* ATTENTION: INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 08-08-2008 BY 60322 UCBAW

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1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

... to "negotiate" ...

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remain in full force and effect. As pointed out in DePriest v. Bradley, supra: "In legal effect this agreement operated to extend the term as effectually as if its principal provision had been inserted in the lease in the form of an option of extension for a further definite period at the election of the lessee, who subsequently made such an election. By either way, then, the result is the same, for the original demise is thereby lengthened to cover the longest time named. The lease and the agreement, therefore, must be construed together and considered in their entirety as forming the contract between the parties." It is significant that the drafter or drafters of the agreement of April 21 carefully avoided using any language that might indicate that the agreement was one for a "renewal."

If we are right in our holding as to the nature and effect of the agreement of April 21, 1932, it follows, from the admitted facts, that defendant wrongfully held over after the expiration of the lease as extended. It further follows, from the uncontradicted evidence, that plaintiff elected to hold defendant for an additional term of one year. Defendant thereby became bound for an additional term of one year upon the same terms and conditions as were contained in the written lease. (See Weiss v. Lamilozik, 262 Ill. App. 551, 556, and cases cited therein; Park Lane Hotel Co. v. Weinberg, Ill. App. Ct., Gen. No. 36807.)

We may say, in conclusion, that we regard defendant's document of July 11, 1932, as practically amounting to an admission that it recognized the legal effect of the agreement and that by remaining in the premises after June 30 it was holding over upon the terms of the original lease if plaintiff elected to treat it as a tenant for another year, and it sought to escape responsibility by having plaintiff sign the document of July 11. This he refused





to do, as appears from his letter of July 13, 1932, wherein he elected to treat defendant as a holdover tenant.

Under the admitted facts and the law plaintiff was entitled to a finding and judgment in the total sum of \$600 for rent for the months of July, August and September, 1932.

The judgment of the Municipal court of Chicago will be reversed, with finding of facts, and judgment will be entered here, in favor of plaintiff and against defendant, in the total sum of \$600.

REVERSED WITH FINDING OF FACTS AND JUDGMENT HERE.

Sullivan, P. J., and Gridley, J., concur.

FINDING OF FACTS.

We find as ultimate facts that defendant is indebted to plaintiff in the total sum of \$600 for rent for the months of July, August and September, 1932.

in 1911, as appears from the report of July 12, 1902, wherein  
he is referred to as a defendant in a habeas corpus proceeding.  
Under the admitted facts and the law administered was  
granted as a discharge and judgment in the case was of course  
for him. The matter of fact, as stated and explained, is that  
The judgment of the Municipal Court of Chicago will  
be reversed, with finding of fact, and judgment will be entered  
therein in favor of plaintiff and against defendant, in the total  
sum of \$1000.  
Sullivan, P. J., and Grady, J., concur.

THE CASE OF JAMES

It was an attempt to prove that defendant is innocent  
to establish in the case and of 1902 that the matter  
of fact, as stated and explained, is that



36904

WILLIAM M. RICHARDS,  
Appellee,

v.

HARRY KAPLAN,  
Appellant.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

274 I.A. 655<sup>1</sup>

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered in the Municipal court of Chicago against defendant in an action of forcible detainer.

Plaintiff, in his complaint, alleges that he is entitled to the possession of Apartment 1, 2142 North Kedzie boulevard, Chicago, Illinois, and that defendant unlawfully withholds the possession thereof from him. In a hearing before the court the evidence for plaintiff consisted of the following six exhibits: (1) A deed in trust by defendant and wife to Foreman Trust and Savings Bank, as trustee, conveying certain real estate in Cook county, Illinois, described as Lots 20 and 21 in Block 7 in Shipman, Bill and Merrill's Subdivision of the east half of the northeast quarter of Section 35, Township 40, north, Range 13, east of the 3d Principal Meridian. (2) A trust agreement whereby said Bank, as trustee, agreed to hold title to said real estate for the use and benefit of defendant, Herman M. Lipman and Benjamin E. Cohen as beneficiaries. (3) An assignment by defendant of an undivided half interest under said trust agreement to Ella I. Lightfoot. (4) An assignment by said Lipman of an undivided half interest under said trust agreement to said Lightfoot. (5) An order by said Lightfoot to Foreman-State Trust and Savings Bank, as successor trustee,

274 I.A. 655

This is an agreement from a judgment entered in the  
Municipal Court of Chicago against defendant in an action of  
forcible detainer.  
Plaintiff, in his complaint, alleges that he is  
entitled to the possession of Apartment 1, 314 North LaSalle  
Street, Chicago, Illinois, and that defendant unlawfully  
withholds the possession thereof from him. In a hearing  
before the court, the parties for plaintiff presented the  
following six exhibits: (1) a deed in trust by defendant and  
wife to Foreman Trust and Savings Bank, an trustee, conveying  
certain real estate in Cook County, Illinois, described as Lots  
20 and 21 in Block 7 in Chicago, Will and Morris's subdivision  
of the east half of the southeast quarter of Section 22, Township  
40, North, Range 12, East of the 2d Township Meridian. (2) A  
trust agreement whereby said Bank, as trustee, agreed to hold  
said real estate for the use and benefit of defendant.  
Morris W. Ligon and Benjamin M. Cohen as beneficiaries. (3)  
A settlement by defendant of an undivided half interest under  
said trust agreement to Elmer I. Lightfoot. (4) An assignment  
by said Ligon of an undivided half interest under said trust  
agreement to said Lightfoot. (5) An order by said Lightfoot  
of Foreman Trust and Savings Bank, its trustee, directing

to transfer title to the premises described in said trust agreement to plaintiff. (6) A trustee's deed by Foreman Trust and Savings Bank to plaintiff, conveying the north thirty feet of Lot 21 described in exhibit 1. After the introduction of these exhibits plaintiff rested. Defendant offered no evidence. During the arguments to the trial court counsel for defendant stated that he would concede that defendant "right now" was living in Apartment 1. Plaintiff concedes that when the deed in trust by defendant and wife to Foreman Trust and Savings Bank, as trustee, (1) was executed the premises conveyed were unimproved. The record does not disclose when or upon what land the building in which "Apartment 1, 2142 North Kedzie Boulevard," is located, was erected, and it is also silent as to how, when or from whom defendant obtained possession of Apartment 1.

Defendant contends, inter alia, that "there is no proof in the record that a demand in writing for the possession of the premises described in the complaint herein was ever made and served on the defendant, as required by statute." Section 2 of the Forcible Entry and Detainer Act provides: "Sec. 2. The person entitled to the possession of lands or tenements may be restored thereto in the manner hereafter provided: \* \* \*," and clause Sixth of the same, eliminating therefrom such parts as are not applicable to the instant case, provides: "Sixth - When lands or tenements have been conveyed by any grantor in possession, \* \* \* and the grantor in possession \* \* \* refuses or neglects to surrender possession thereof after demand in writing by the person entitled thereto, or his agent." The parties agree that clause Sixth governs this appeal. It is conceded that there is no proof that a "demand in writing" was made and served upon defendant, but plaintiff contends that the service of such demand, under the statute, is merely



to transfer title to the premises described in said lease agreement  
 made to plaintiff. (c) A mortgage deed by Thomas Trust and  
 Savings Bank to plaintiff, conveying the north thirty feet of lot  
 11 described in exhibit A. Also the inclosure of same as  
 exhibited plaintiff's record. Defendant offered no witness. During  
 the arguments to the trial court counsel for defendant stated that  
 he would concede that defendant "did not" was lying in testimony  
 1. Plaintiff contends that when the deed in trust by defendant  
 and wife to Thomas Trust and Savings Bank, as trustee, (1) was  
 executed the premises conveyed were unimproved. The record does  
 not disclose when or upon what was the building in which  
 "Apartment 1, 2345 North Maple Boulevard," is located, was  
 erected, and it is also silent as to how, when or from whom  
 defendant obtained possession of Apartment 1.  
 Defendant contends, inter alia, that "there is no proof  
 in the record that a demand in writing for the possession of the  
 premises mentioned in the complaint herein was ever made and served  
 on the defendant, as required by statute." Section 1 of the  
 Real Estate Law and Section 41 of the Real Estate Law of the State of  
 Illinois in the present plaintiff's petition " \* \* \* and also  
 Fifth of the same, claiming that the same are not  
 applicable to the instant case, provided: "THAT - That lands or  
 premises have been conveyed by any person in possession, \* \* \*  
 and the person in possession \* \* \* refuses to comply or surrender  
 possession thereof after demand in writing by the person entitled  
 thereto, or his agent." The parties agree that clause Fifth herein  
 is optional. It is conceded that there is no proof that a "demand  
 in writing" was made and served upon defendant, but plaintiff con-  
 tends that the service of such demand, under the statute, is merely

a condition precedent to the filing of a forcible detainer suit and that "it has been held by our courts that such a condition precedent may be waived;" that as the record fails to show that defendant affirmatively raised the instant point during the trial he will not be heard to raise it in this court. None of the four cases cited by plaintiff in support of the contention that the service of a "demand in writing" is merely a condition precedent applies to the question now before us.

"We may premise by saying that the action of forcible entry and detainer, or forcible detainer, is a special statutory proceeding, summary in its nature and in derogation of the common law, and it follows that the conditions and requirements that the statute prescribes in conferring jurisdiction must clearly exist and that the mode of procedure provided by it must be strictly pursued. Steiner v. Fridley, 23 Ill. 179; Schaumcoffal v. Helm, 77 id. 567; French v. Miller, 126 id. 611; Burns v. Nash, 23 Ill. App. 552." (Fitzgerald v. Quinn, 165 Ill. 354, 360.)

In Wentworth v. Bankstone, 233 Ill. App. 48, 49-51, it is said:

"It has been repeatedly held that an action of forcible entry and detainer is a special statutory proceeding summary in its nature and in derogation of the common law. Wells v. Hogan, 1 Ill. (Breese) 337; French v. Miller, 126 Ill. 611; Fitzgerald v. Quinn, 165 Ill. 354.

"In the Wells case, which was an action of forcible detainer, the court said: 'The proceedings \* \* \* being summary, and contrary to the course of the common law, must strictly conform to the requisitions of the statute.'

"In the French case, which was also an action of forcible entry and detainer, the court held that a confession of judgment, entered under the terms of a lease awarding possession of the premises to plaintiff, was unauthorized by law and void. It was there said (p. 618): 'This action is a special statutory proceeding, summary in its nature, and in derogation of the common law, and it is a rule of universal application in such actions, that the statute conferring jurisdiction must be strictly pursued in the method of procedure prescribed by it, or the jurisdiction will fail to attach, and the proceeding be coram non iudice and void. \* \* \*

"While forcible entry and detainer is a civil proceeding for restitution it is based upon, and has by modern legislation been evolved from the English forcible entry and detainer, which was a criminal proceeding merely. Ejectment, from its slow progress, was an inadequate remedy to a landlord, and the legislature provided the summary remedy by which a speedy recovery of possession may be secured, but to prevent hasty action and to secure tenants and their families from the danger and inconvenience of being forcibly ejected without notice and reasonable time for preparation, certain safeguards were provided by the statute."



a condition precedent to the filing of a writ of habeas corpus and that "it has been held by our courts that such a condition precedent may be waived," thus as the record fails to show that defendant affirmatively waived the condition precedent the trial he will not be heard to raise it in this court. None of the four cases cited by plaintiff in support of the contention that the waiver of a "demand in writing" is merely a condition precedent applies to the question now before us.

The two precedents by which the section of Toronto was obtained, in Toronto, Ontario, is a special statutory proceeding, namely in its nature and in designation of the common law, and it follows that the conditions and requirements that the plaintiff is required to satisfy must be strictly exact and that the mode of procedure provided by it must be strictly followed. Reid v. Reid, 111 Ont. Rep. 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

In Reid v. Reid, 111 Ont. Rep. 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

"In the Reid case, which was an action of habeas corpus, the court said: 'The proceedings in a habeas corpus are not in the nature of the common law, but are entirely governed by the regulations in the statute.'"

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"In the Reid case, which was an action of habeas corpus, the court said: 'The proceedings in a habeas corpus are not in the nature of the common law, but are entirely governed by the regulations in the statute.'"



It was further said (p. 621): "Such court of record does not proceed in forcible detainer by virtue of its power as a court of general jurisdiction, but derives its authority wholly from the statute, and in such proceeding is therefore to be treated as a court of special and limited jurisdiction."

In City of Chicago v. Steamship Lines, 323 Ill. 309, 315-6, it is said:

"The civil remedy in this State for the restitution of premises, based on forcible entry and detainer, was unknown to the common law and is purely statutory in its origin. While our statute on forcible entry and detainer contains some of the ideas found in the English statutes aforesaid, particularly the statutes of Henry VI, they do not embody all of the features of any of those statutes, and they cannot be said to be an adoption of any of them in their entirety or of any other English statute. It has been repeatedly decided by this court that an action of forcible entry and detainer is a special statutory proceeding summary in its nature and in derogation of the common law and that our courts do not proceed thereon by virtue of their power as courts of general jurisdiction but derive their authority wholly from the statute, and in such a proceeding they are to be considered and treated as a court of special and limited jurisdiction. (French v. Miller, 126 Ill. 611; Sells v. Hogan, Breese, 337; Fitzgerald v. Quinn, 165 Ill. 354.) The action being a special statutory proceeding in derogation of the common law the statute must be strictly followed as to the remedy pursued."

The contention of defendant "that such a demand is jurisdictional" and that the failure of plaintiff to prove that he complied with such statutory requirement is fatal to his action, must be sustained. The Forcible Entry and Detainer Act is summary in its nature and in derogation of the common law, and it is no hardship to require a landlord who seeks its assistance to follow strictly the mode of procedure provided by it, and the proof of the statutory demand is an essential part of a case brought under the act. If the courts did not insist upon a strict compliance with the statute great injustices to tenants would inevitably follow. In addition, we may say that the claim of plaintiff that he could have proved that a written demand, in accordance with the statute, was actually served on defendant but that he was lulled to sleep by the conduct of counsel for defendant, is not justified by the record. Counsel for defendant, at the close of plaintiff's evidence, moved for a finding for defendant on the ground that plaintiff had failed to



make out a prima facie case, and he argued that to make out such case plaintiff had "to prove everything that Section (clause) 6 contains," and counsel then read to the court clause Sixth.

There is also merit in the contention of defendant that plaintiff has failed to prove that defendant was a "grantor in possession" of the premises described in the complaint within the meaning of clause Sixth. There is, undoubtedly, merit in the argument of defendant that plaintiff, in answering the instant contention, is compelled to assume alleged facts not sustained by the record and to draw inferences not warranted by the evidence. We find no proof in the record to show that Apartment 1, occupied by defendant, is located upon the property to which plaintiff claims title by his deed.

We do not deem it necessary to pass upon several other contentions raised by defendant.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Sullivan, P. J., and Gridley, J., concur



and all a single fact was, and he argued that to make out such  
some plaintiff had "as many everything that plaintiff (name) a  
certain," and counsel then went to the case of Smith.

There is also merit in the contention of defendant that  
plaintiff has failed to prove that defendant was a "person" in  
possession of the premises referred to in the complaint within the  
meaning of Article 10. There is undoubtedly merit in the  
argument of defendant that plaintiff, in removing the house  
construction, is compelled to remove all the house and not only  
by the record and to show therefore not entitled by the law  
to show. We find no merit in the record as shown that plaintiff is  
compelled by defendant, as located upon the property to which  
plaintiff claims title by his deed.

It is not then necessary to show upon several other  
questions raised by defendant.

The judgment of the Municipal Court of Chicago is  
reversed and the cause is remanded.

WILLIAM H. HARRISON.

Submitted: 12:12 and 12:15, 12:15.

38453

IN THE MATTER OF THE PETITION OF  
DR. ALEX B. MAGNUS,

DR. ALEX B. MAGNUS,

Appellant,

v.

MARY E. CONNOR,

Appellee.

APPEAL FROM

COUNTY COURT

COOK COUNTY.

274 I.A. 655<sup>2</sup>

Opinion filed March 14, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the County Court of Cook County entered in a proceeding seeking the release of petitioner under the Insolvent Debtors Act. Petitioner had been arrested and imprisoned under a capias ad satisfaciendum issued by the Circuit Court of Cook County upon a judgment of that court in favor of one Mary E. Connor in an action brought by her against petitioner, charging malicious prosecution and false arrest. By the order appealed from, the County Court found that malice was the gist of the action in the suit in which the judgment was entered in the Circuit Court, ordered the petitioner remanded to the custody of the sheriff, and dismissed the petition. The suit in the Circuit Court was against Alex B. Magnus, petitioner herein, Mrs. Alex B. Magnus and Emelie M. Williams. As originally filed in the Circuit Court, the declaration contained three counts.

The first count was against Emelie M. Williams, alone. The action was dismissed as to her.

The second count of the declaration filed in the suit in the Circuit Court, charged in substance that the three defendants falsely and maliciously, and without any reason or probable cause, entered into a conspiracy to defame and cause the unlawful arrest and detention of plaintiff, and with malicious intent, agreed between themselves to have Emelie M. Williams file a petition for the issuance of a writ of Inquisition against the plaintiff.

IN THE MATTER OF THE ESTATE OF  
MR. JAMES A. HARRIS

VS.  
JAMES A. HARRIS

Plaintiff

VS.

JAMES A. HARRIS

Defendant

County Court

State of New York

274 I.A. 655

Opinion filed March 14, 1934

MR. JUSTICE WATSON delivered the opinion in this case. This is an appeal from an order of the County Court of Dutchess County entered in a proceeding seeking the release of petitioner under the Insanity Provisions Act. Petitioner was indicted and imprisoned under a warrant of arrest issued by the District Court of Dutchess County upon a judgment of that court in favor of one Mrs. J. Connor in an action brought by her against petitioner, charging wilful neglect and abuse. By the order appealed from, the County Court found that while the gist of the action in the suit in which the judgment was entered in the District Court, ordered the petitioner remanded to the custody of the sheriff, and dismissed the petition. The suit in the District Court was against Mrs. J. Connor, petitioner's brother, Mrs. Ellen E. Connor and Charles E. Williams. An originally filed in the District Court, the petition was amended three times. The first amendment was signed Charles E. Williams, alone. The other two amendments were signed as he was. The second amendment of the petition filed in the suit in the District Court, charged in substance that the first defendant, namely petitioner, was wilful and malicious, and without any reason or probable cause, caused into a conspiracy to detain and abuse the said petitioner, and detention of petitioner, and this defendant (Connor), agreed between themselves to keep Charles E. Williams this a petition for



Mary B. Conner, and without any reasonable or probable cause to appear before the judge of the County Court, and there falsely and maliciously and without any reasonable cause, swear to a petition in writing charging that the plaintiff was insane and unsafe to be at large, and stating in this petition that the petitioner, Alex B. Magnus, had examined the plaintiff and found her to be mentally unsound and in need of institutional care, all of which was false. It is further alleged in this second count of the declaration that by means of this conspiracy and false swearing, the petitioner and the other defendants caused the Writ of Inquisition to issue, and that, therefore, in pursuance of such conspiracy, the plaintiff was arrested and taken into custody under a Writ of Inquisition issued by the judge of the County Court on the showing made by these defendants. It is further alleged in this count that the arrest of plaintiff brought her into scandal and disgrace, and put her to a great deal of expense in procuring her discharge.

The third count is substantially the same as the second count. As we read this count, it is alleged therein that the acts of the defendants were malicious and without any reasonable or probable cause. To the declaration Alex B. Magnus and Mrs. Alex B. Magnus filed pleas of the general issue. Petitioner failed to appear at the trial in the Circuit Court and offered no defense to the action brought there. The cause was submitted to a jury, and after hearing the witnesses for the plaintiff, the court instructed the jury as follows:

"The Court instructs the jury that if you believe from the evidence that the defendant, falsely and maliciously, and without any reasonable or probable cause, caused the said plaintiff to be deprived of her liberty, the Jury may allow as damages any sum not exceeding the amount sued for even though the sum allowed may exceed the amount of damages actually proven.

The Court instructs the Jury that if you believe from the evidence that the defendant, maliciously and without any reasonable or probable cause instituted or caused to be instituted proceedings, or attempted to adjudicate the plaintiff herein insane, or deprive her of her liberty, the Jury are authorized to find exemplary

Wm. D. Connor, and without any reasonable or probable cause to  
know before the judge of the County Court, and there lawfully and  
unlawfully and without any reasonable cause, went to a position in  
existing charging that the plaintiff was insane and wanted to be so  
found, and stating in this petition that the plaintiff, Alex. E.

Hogman, had examined the plaintiff and found her to be mentally  
insane and in need of institutional care, all of which was false.  
It is further alleged in this second count of the petition that  
by means of this conspiracy and false swearing, the plaintiff and  
the other defendants caused the writ of Habeas Corpus to issue, and  
that, therefore, in consequence of such conspiracy, the plaintiff was  
arrested and taken into custody under a writ of Habeas Corpus issued  
by the judge of the County Court on the showing made by these defend-  
ants. It is further alleged in this count that the arrest of plain-  
tiff brought her into contact and disgrace, and put her to a great  
deal of expense in procuring her discharge.

The third count is substantially the same as the second  
count. As we read this count, it is alleged therein that the wife  
of the defendant went unlawfully and without any reasonable or pro-  
bable cause. To the petition Alex. E. Hogman and Mrs. Alex. E.  
Hogman filed pleas of the general issue. Petitioner failed to answer  
at the trial in the District Court and offered no defense to the  
action brought there. The case was submitted to a jury, and after  
hearing the witnesses for the plaintiff, the court instructed the  
jury as follows:

"The Court instructs the jury that if you believe  
from the evidence that the defendant, plaintiff's wife,  
did unlawfully and without any reasonable or probable cause,  
caused the writ of Habeas Corpus to be granted to her, and  
the jury may find in favor of the plaintiff and award her  
damages and for every thing she has claimed by reason  
of the arrest of plaintiff's wife, recovery.  
The Court instructs the jury that if you believe  
from the evidence that the defendant, plaintiff's wife,  
did unlawfully and without any reasonable or probable cause,  
caused the writ of Habeas Corpus to be granted to her, and  
the jury may find in favor of the plaintiff and award her  
damages and for every thing she has claimed by reason  
of the arrest of plaintiff's wife, recovery."



or punitive damages, that is, to punish the defendant and to furnish an example to deter others from like practice."

The grounds upon which defendant asks for reversal of the County Court are that counts one and three of the declaration filed in the Circuit Court did not charge the defendant with malice, therefore, that the judgment of the Circuit Court was not res adjudicata on that question; that defendant in the trial in the County Court, should have been allowed to show by competent evidence that malice was not the gist of the action in the Circuit Court, and that in rejecting the offer of proof on such question, which it did, the County Court was in error. It is insisted by petitioner that inasmuch as the jury were not instructed to disregard it, therefore, the first count in the declaration, which did not charge malice, was before the jury in the trial in the Circuit Court. This judgment of the Circuit Court was reviewed on appeal to this court. (Donner v. Magnus, 203 Ill. App. 641.) The judgment was affirmed, and this court there held as to the first count that by the dismissal "as to Emalie E. Williams, as she was the only defendant named in said count, this count fell, leaving the two remaining counts which " \* " charged the defendant, Alex E. Magnus." This first count being out of the case, there was no occasion for the trial judge in the Circuit Court or in the County Court to regard it.

As stated, in the trial of the case in the Circuit Court, defendant was not present and offered no evidence. In its ruling upon this offer of proof on the hearing in the County Court, to the effect that defendant was not guilty of malice, as charged in the declaration, the County Court held that petitioner was confined to the evidence offered in the trial court and refused to receive other evidence. As stated, the first count was out, and the third count does, in our opinion, allege malice. However, even if petitioner's



or constructive notice, and is to punish the defendant  
and to provide an example to deter others from like  
conduct.

The grounds upon which defendant asks for reversal of

the County Court are that counts one and three of the indictment  
filed in the Circuit Court did not charge the defendant with murder,

therefore, that the judgment of the Circuit Court was not valid

and judgment on that question; that defendant in the trial in the  
County Court, should have been allowed to show by competent evidence  
that he was not the actor in the crime in the Circuit Court, and  
that in rejecting the offer of proof on such question, which it did,

the County Court was in error. It is insisted by petitioner that  
inasmuch as the jury were not instructed to disregard it, therefore,  
the first count in the indictment, which did not charge murder, was

before the jury in the trial in the Circuit Court. This judgment

of the Circuit Court was reviewed on appeal to this court. (Conover v.

Marshall, 203 Ill. App. 611.) The judgment was affirmed, and this

court then said as to the first count that it was dismissed "as to  
counts one and three, as the only defendant named in said count,

this court held, finding the two remaining counts which "

remained the defendant, that it affirmed." This first count being the

of the case, there was no occasion for the trial judge in the Circuit

Court or in the County Court to reject it.

It is stated, in the trial of the case in the Circuit Court,

defendant was not present and offered no evidence. In the trial

upon this issue it was held by the court in the County Court, to the

effect that defendant was not guilty of murder, as charged in the

indictment. The County Court was then affirmed and defendant was

for reasons stated in the first count and refused to receive any

evidence. It is stated, the first count was not, and the first count

was, in fact, dismissed, although it was affirmed, upon its merits.

contention were justified as to the first and third counts, it is admitted that the second count does allege malice. The Supreme Court in Buck v. Alex, 350 Ill. 187, said:

"The term 'malice' as used in the Insolvent Debtors Act, applies to that class of wrongs which are inflicted with an evil intent, design or purpose, implies that the guilty party was actuated by improper or dishonest motives, and requires intentional perpetration of an injury or wrong on another. (First Nat. Bank of Flora v. Berkett, 181 Ill. 391; Jennings v. Alex, 139 Ill. 254; Wilson v. Farrell, 138 Ill. 327; Kellar, Attinger & Fink v. Barton, 238 Ill. 256.) Upon the hearing of the petition for discharge under the Insolvent Debtors act, if the declaration in the cause in which the judgment against the petitioner was rendered did not charge malice, evidence extrinsic to the record of that cause is not admissible to show that there was malice on the part of the petitioner in the original transaction on which the judgment was based. (Kellar, Attinger & Fink v. Barton, *supra*.) If malice is not charged in the declaration, necessarily it is not of the gist of the action. On the other hand, if the declaration consists of several counts, one or more stating a cause of action the gist of which is malice and one or more a cause of action of which malice is not the gist, and the verdict is general, not specifying the count or counts on which it is based, the record does not show whether the verdict is based on a count stating malice as the gist of the action. The presumption is that the verdict and judgment are based upon a cause of action of which malice is the gist and that the defendant cannot be released from imprisonment under a *causa ad satisfaciendum* under the Insolvent Debtors act." (*italics ours*)

Whether the third count of the declaration does not contain an allegation of malice, as petitioner contends, or does contain such an allegation, as this court views it makes no difference, and we are of the opinion that the County Court was not in error in rejecting the evidence as to petitioner's intent, and in entering the order appealed from. The order is, therefore, affirmed.

AFFIRMED.

WILSON, J. AND HEBEL, J. CONCUR.

10-11-68

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

[illegible]

and we are of the opinion that the County Court was not in error in rejecting the evidence as to defendant's intent, and in entering the order recalled from. The order is, therefore, affirmed.



36499

MERCHANTS AND MANUFACTURERS SECURITIES  
CO., a Corporation,

Plaintiff in Error,

v.

H. G. HANSON, Trading as SUDS SOFT WATER  
LAUNDRY,

Defendant in Error.

ORDER TO

MUNICIPAL COURT

OF CHICAGO.

274 I.A. 655<sup>3</sup>

Opinion filed March 14, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this writ of error plaintiff seeks the reversal of a judgment for costs entered against it in the Municipal Court of Chicago. Judgment was originally entered in favor of plaintiff and against defendant on a judgment note. A petition and motion of defendant to vacate the judgment and to give defendant a hearing was presented to the court, the judgment was vacated, and as stated, judgment entered against plaintiff for costs. The trial was by the court without a jury.

The record shows that on May 26th, 1931, defendant signed a promissory note for \$100.00, payable in installments. This note contained a warrant of power of attorney to confess judgment thereon. The note was payable to the Knit-Knit Manufacturing Corporation and by it assigned to the plaintiff. The judgment was entered on March 17th, 1932, and the motion to vacate was made May 10th, 1932.

In his petition and motion to vacate, defendant recites in substance that the Suds Soft Water Laundry defendant, entered into a contract with the Knit-Knit Manufacturing Corporation for a machine to mend stockings, such machine to be leased at a rental and that upon payment of the last installment of rent, the Knit-Knit Manufacturing Corporation agreed to give a bill of sale to the lessee; that the machine was delivered to defendant and was defective in that it did not do the work for which it was intended; that it could not be used by defendant in its business; that the machine was of

RECEIVED  
 COMMUNICATIONS SECTION  
 U.S. DEPARTMENT OF JUSTICE  
 MAR 14 1934  
 DIVISION OF INVESTIGATION  
 NEW YORK  
 TO DIRECTOR  
 FROM NEW YORK  
 RE NEW YORK LETTER OF MARCH 14, 1934  
 RE NEW YORK LETTER OF MARCH 14, 1934  
 RE NEW YORK LETTER OF MARCH 14, 1934

Opinion filed March 14, 1934

The undersigned, having been appointed by the court  
 to examine the books and records of the company  
 and to report thereon to the court, has the honor  
 to report that the books and records of the company  
 have been examined and that the same show that  
 the company has not paid the taxes due and owing  
 to the United States for the years 1928, 1929,  
 1930, 1931, 1932, and 1933. The total amount  
 of taxes due and owing is \$1,141.65.

The undersigned further reports that the company  
 has not paid the taxes due and owing to the  
 United States for the years 1928, 1929, 1930,  
 1931, 1932, and 1933. The total amount of  
 taxes due and owing is \$1,141.65. The undersigned  
 further reports that the company has not paid  
 the taxes due and owing to the United States  
 for the years 1928, 1929, 1930, 1931, 1932,  
 and 1933. The total amount of taxes due and  
 owing is \$1,141.65.

In his petition and motion to vacate, defendant  
 in substance states that the said debt was  
 paid to the United States for the years 1928,  
 1929, 1930, 1931, 1932, and 1933. The undersigned  
 further reports that the company has not paid  
 the taxes due and owing to the United States  
 for the years 1928, 1929, 1930, 1931, 1932,  
 and 1933. The total amount of taxes due and  
 owing is \$1,141.65.

no value to defendant and that the note and contract was null and void for the reason that the consideration for such note wholly failed. It is further alleged that the assignment of the note to plaintiff was made after maturity, and that plaintiff was and is not a bona fide holder before maturity of the note in due course. Plaintiff insists that the judgment for costs be reversed because defendant was not diligent in presenting his motion to vacate; that defendant is bound by a document signed by him and that defendant did not offer to return this machine.

Defendant testified that at the time he purchased from the Knu-Knit Manufacturing Company the machine referred to, he had a conversation with one Barnes, a salesman for that company; that Barnes said he was selling defendant a machine that would mend silk hose perfectly, but that upon trying the machine he found it did not do the work as represented, and that he was compelled to resort to hand work on the stockings; that the Knu-Knit Manufacturing Corporation sent a demonstrator to defendant and this demonstrator could not make the machine accomplish anything in the way of mending stockings; that the Knu-Knit Manufacturing Corporation sent another person to defendant to try to operate it and promised that the Knu-Knit Manufacturing Corporation would send another machine to take the place of the machine in question, but that they did not do so and the machine is now in possession of defendant at his home and that defendant has not been able to operate it. Defendant further testified on cross-examination that before the demonstrator, a Miss White, left, after making the demonstration, she presented defendant with a card and stated that "this card here shows my time, I have to show that I spent three days here;" that at her request he signed the card, and this demonstrator then stated to the witness that "we will send you a new machine." Defendant told her he did not think the machine was any good, and that he did not think it would work.





Ether Hanson, the wife of the defendant, stated that she was a part owner of the business of defendant, and testified in substance that the machine in question would not do the work which the Knu-Knit Manufacturing Corporation, through its agent, represented that it would do.

The contract between the Knu-Knit Manufacturing Corporation is in evidence, and was when executed a document of which the note sued on was a part and from which it was torn. This contract provides that upon payment of the note sued on, the title to the machine in question should pass to defendant, title in the interim to remain in the Knu-Knit Manufacturing Corporation.

It seems to be admitted that plaintiff acquired title to the note in question after maturity, and that defendant may make all the defenses that he could have made had the title to the note remained in the original payee. As to the question of defendant's diligence in presenting his motion to vacate, we note that the judgment was entered in the Municipal Court of Chicago on March 17th, 1932, and the motion to vacate was made on May 10th, 1932. The record shows that defendant is not now, and was not at the time the judgment was entered, a resident of Cook County, but resided some distance from Chicago. There is nothing in the record to indicate that the motion to vacate was not made in ample time, nor that plaintiff has suffered any inconvenience or loss by reason of the time which elapsed between the entry of the judgment and the entry of the motion to vacate. There is nothing in this point.

Plaintiff's next point is that defendant is bound by a written statement delivered to a demonstrator of the machine, such demonstrator having been sent by the seller of the machine in question to make a demonstration and ascertain whether the machine would work satisfactorily or not. Defendant states that after such demonstration had been made, he was requested by the demonstrator to sign a card,

Robert Hanson, the wife of the defendant, stated that  
she was a part owner of the business of defendant, and testified in  
substance that the machine in question would not do the work which  
the law-fully manufactured machine, through its agent, was  
needed that it would do.

The witness advised the law-fully manufactured machine  
was in evidence, and was manufactured a document which the  
note was on one part and then which it was torn. This contract  
provided that upon payment of the note made on the title to the  
machine in question should pass to defendant, title in the interim  
to remain in the law-fully manufactured machine.

It seems to be admitted that plaintiff acquired title to  
the note in violation of the statute, and that defendant was not  
all the evidence that he could have had for the title to the note  
present in the original paper. As to the question of defendant's  
obligation in retaining his action to recover, he notes that the law-  
suit was entered in the Municipal Court of Chicago on March 17th,  
1931, and the action to vacate was made on May 10th, 1932. The  
evidence shows that defendant is not now, and was not at the time the  
judgment was entered, a resident of Cook County, but resided some  
distance from Chicago. There is nothing in the record to indicate  
that the action to vacate was not made in ample time, nor that plain-  
tiff has suffered any inconvenience or loss by reason of the time  
which elapsed between the entry of the judgment and the entry of  
the motion to vacate. There is nothing in this case.

PLAINTIFF'S MOTION BEING IN THIS CASE DENIED IS ORDERED AS FOLLOWS:  
THAT THE COURT SHALL BE A COMMISSIONER OF THE COURT, WITH  
PLAINTIFF BEING PART OF THE COURT OF THE MACHINE IN QUESTION  
IN THIS CONNECTION AND DEFENDANT BEING THE MACHINE WHICH WAS  
ACQUIRED BY HIM, DEFENDANT BEING THE LAW-FULLY MANUFACTURED  
MACHINE WHICH HE WAS PURCHASED BY THE COMMISSIONER OF THE COURT.



indicating that the time spent by her in her work was actually spent. The card he signed contained the following: "This is to certify that your instructor, Miss Mae White, has demonstrated our Knu-Knit Hosiery Repair Machine and instructed our operator to our complete satisfaction. We further certify that our Knu-Knit Machine works satisfactorily and efficiently." He said that he did not read the card and knew nothing of its contents, but took the word of the demonstrator that it was only a record of her time. His statement in this regard is not disputed. No witnesses were produced by plaintiff to dispute the testimony of defendant, his wife and an employee of defendant, to the effect that the machine in question would not do the work claimed for it and which the seller promised it would do, and that the machine was useless to the defendant.

It is further insisted by plaintiff that defendant cannot urge his defense to the note so long as the machine in question remains in plaintiff's possession. The defendant leased the machine from plaintiff, and the contract provided that the title would pass only after the note in question was paid. Plaintiff cites Cahill's Illinois Revised Statutes, 1831, Chapter 121-1, Paragraph 72, as follows:

"Where goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or offer to return the goods to the seller \* \* \*."

There was no sale of the property, therefore, the statute has no application. The title is still in the seller, and he can procure possession of it if he chooses. The judgment is affirmed.

REVISED.

WILSON AND HEBEL, J. CONCUR.



36530

JAMES POTENZI,

(Plaintiff) Appellee.

v.

PATRICK WARREN CONSTRUCTION CO.,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

274 I.A. 655<sup>4</sup>

Opinion filed March 14, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment for \$450.00 rendered against it in the Municipal Court of Chicago. The action is for damages alleged to have been sustained by plaintiff, who claims to have worked as a watchman on a building being constructed for the County of Cook at Winchester and Polk Streets in the City of Chicago. No brief has been filed by plaintiff. The suit as originally commenced is against Patrick Warren and William H. Brown. An amended statement of claim was filed in the Municipal Court, upon which the hearing there was had, against Patrick Warren, William H. Brown, William H. Brown & Co., and Patrick Warren Construction Co. To this amended statement of claim, Patrick Warren Construction Co., appellant, filed an affidavit of merits, wherein it is stated that:

"Defendant denies that it ever employed the plaintiff on or about February 20, 1932, or at any other time, by contract of any kind, to work for it as alleged in said statement of claim, and denies that plaintiff worked for this defendant as alleged therein. Defendant denies that it is indebted to the plaintiff in any sum whatsoever."

William H. Brown, president of the William H. Brown Construction Co., was produced as a witness for the plaintiff. He testified in substance that his company had a contract to move a building at Winchester and Polk Streets, and that the work was being done in February, 1932. He stated that the Patrick Warren Construction Company was the principal contractor on the job, according to the understanding of the witness, and that he, Brown, had nothing to do with the employment of labor after March 8th, 1932, and that



to do with the employment of labor after 1933, and that

he, Brown, had no contract for watchmen or laborers that were doing any work, other than removing machinery.

Plaintiff testified in substance that he had a talk with Mr. Brown about going to work on the job at Winchester and Folk Streets about February 20th, 1938, and that he started to work there on February 22nd, and that Brown left him on the job. He further stated that nothing was said about wages, and that some men who worked for Brown paid him for 10 days work from February 20th to March 2nd. This witness also stated that Mr. Warren's foreman told him he should watch the water pump. He testified further that he talked with Mr. Warren and Mr. Warren said, "See Brown", and that in March he took the place and that Brown did not come on the job any more. On cross-examination he stated that he asked Mr. Warren for his check, and Mr. Warren said, "I ain't got your check, Brown got to pay you." He stated that at one time Mr. Warren offered to pay him \$5.00, another time \$3.00 and another time \$20.00. Other witnesses testified to the effect that they saw plaintiff on the job.

Patrick Warren testified on behalf of the defendant corporation, and stated that it was the general contractor for and that he was familiar with the work being done in moving the building at Winchester and Folk Streets in the City of Chicago, and that the Patrick Warren Construction Company sublet the contract for this work to the William W. Brown Construction Company which did all the work. He stated that he knew the plaintiff. This witness was asked whether, on behalf of the Patrick Warren Construction Company, he employed any men on this particular job at Winchester and Folk Streets, and his answer was that he did not do so. This answer was objected to, and the objection was sustained by the court, the court stating that "he might not have definitely employed somebody, but he might

Mr. Brown, but he wanted the money for himself and was not  
any more, other than removing himself.

Witness testified in substance that he had a talk with

Mr. Brown about going to work on the job at Winchester and told  
himself about February 1937, 1938, and that he started to work there

on February 1938, and that Brown told him on the job. He further

stated that nothing was said about wages, and that some man who

worked for Brown paid him ten dollars week from February 1938 to

March 1938. This witness also stated that Mr. Brown's foreman

told him he should watch the water pump. He testified further that

he talked with Mr. Brown and Mr. Brown said, "See Brown", and

that in March he took the place and that Brown did not come on the

job any more. On cross-examination he stated that he asked Mr.

Brown for his check, and Mr. Brown said, "I ain't got your check,

Brown got to pay you." He stated that at one time Mr. Brown

attempted to pay him \$5.00, another time \$3.00 and another time \$2.00.

Witness also testified in the above that he was paid \$10.00

on the job.

Witness further testified on behalf of the defendant that

petition, and stated that it was the general contractor for and that

he was familiar with the work being done in moving the building at

Winchester and told himself in the City of Chicago, and that the

plaintiff Brown Construction Company advised the defendant that this

work to the plaintiff Brown Construction Company which did all the

work. He stated that he knew the plaintiff. This witness was asked

whether, on behalf of the plaintiff Brown Construction Company, he

employed any man on this particular job at Winchester and told himself

and his answer was that he did not do so. This answer was objected

to, and the objection was sustained by the court. The court stating

that he might not have definitely employed somebody, but he might



have been liable for his wages if he had not done certain things." Mr. Warren further testified that he never had any conversation with the plaintiff in the months of February, March, April, May or June of 1932, and that he did not direct plaintiff to do anything on behalf of the Patrick Warren Construction Company from February 20th, 1932, down to the day of the trial.

From the entire evidence, it is apparent that plaintiff, if employed, was an employee of the William E. Brown Company, subcontractors under the defendant company, and that there was no privity of contract between plaintiff and defendant, and that the court was in error in entering the judgment against the defendant. The judgment is, therefore, reversed and remanded.

REVERSED AND REMANDED.

WILSON AND NEBEL, JJ. CONCUR.

have been liable for his wages if he had not done certain things."

Mr. Nathan further testified that he never had any conversation

with the plaintiff on the matter of February, March, April, May or

June of 1938, and that he did not direct plaintiff to do anything

in regard to the machine except immediately following from February

20th, 1938, down to the day of the trial.

When the entire statement, it is repeated that plaintiff,

if employed, was an employee of the filling of these tanks, and

plaintiff never had any conversation with him about the

matter of plaintiff's liability for damages, and that the

plaintiff is plaintiff, plaintiff and defendant.

It is further stated that

STATE OF NEW YORK, ss. I, the Clerk of the County of New York,

36539

AGNES SZIUBAN,

(Plaintiff) Appellee,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE  
COMPANY, a corporation,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

274 I.A. 655

Opinion filed March 14, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment of the Municipal Court of Chicago against it in an action brought by plaintiff as beneficiary under two policies of insurance issued to John Sziuban, her son, now deceased. The trial was before the court and a jury.

The first policy was issued October 16th, 1929, and numbered 18908424, and the second was issued November 6th, 1929, and numbered 30108194. The insured in his application for each of these policies stated that he was in sound health, and free from all physical defects and infirmities. The policies themselves each provide that if the insured, before the date of the policies and within two years thereof, had any pulmonary disease, then the policies would be void. The defense is that inasmuch as the insured was, and had been for some time prior to the application for and the issuance of these policies, suffering from pulmonary consumption, therefore, the beneficiary could not recover. In her statement of claim, plaintiff alleges that the insured was at the time of the application for the insurance suffering from pulmonary consumption, had been repeatedly treated for this disease, and that the agent of the defendant company was fully apprized of the physical condition of the insured before the policies were issued. The insured died of tuberculosis June 27th, 1930. One policy provides that upon this death the beneficiary should be paid \$410.00, and the other policy provides



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Opinion filed March 14, 1934

THESE ARE THE OFFICIAL RECORDS OF THE UNITED STATES DEPARTMENT OF JUSTICE

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Received by John Wiley & Sons, Inc. 10/1/94. Accepted for publication 10/1/94.

• *Journal of the American Medical Association*

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The insured in his application for each of these

His report will have shown that the situation is not as serious as it appears.

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of these policies, suffering from extremely low morale, therefore, therefore, will be very low.

The beneficiary could not recover. In her statement of claim, claimant

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that she should be paid \$874.00. The verdict and judgment were for \$974.00. The premiums on the policies were payable in monthly installments. All premiums were paid and receipted for by the defendant company by its agent, up to the time of the death of the insured.

John Kotowich testified for plaintiff, in substance, that in 1929 he worked for the John Hancock Mutual Life Insurance Company as a salesman to collect and sell insurance as an agent; that he had a conversation with the insured, John Dziuban, about three months before he wrote the insurance; that the insured then informed the witness that he was sick and did not think he would pass the examination; that he Kotowich, spoke to Joseph Wigoni, who was the then assistant manager of defendant company, the next morning after he had talked with John Dziuban, and asked Wigoni to see the insured, which Wigoni did; that John Dziuban the insured, then signed an application for the insurance in the presence of Wigoni, and that Wigoni filled out the blanks in the application after the insured's name was signed thereto. The witness further testified that he afterwards delivered the insurance policies to the insured. This witness also stated that he told Joseph Wigoni that the insured was in a sanitarium in Will County, but that the agent said "he is all right, go ahead and write him, we need the business."

Joseph A. Wigoni, a witness for the defendant, testified that he was assistant manager for the John Hancock Mutual Life Insurance Company, had been for four years and that his home was in Joliet, Illinois. This witness was shown the application for insurance made by John Dziuban. The witness identified his own signature signed to this document as Assistant Superintendent of the John Hancock Mutual Life Insurance Company on this document below the following certificate:

"I hereby certify that each of the above questions was answered as recorded, and that I witnessed the signature

that she should be paid \$175.00. The various and judgments were for \$274.00. The premiums on the policies were payable in monthly installments. All premiums were paid and received for by the defendant company by its agent, as to the time of the death of the insured.

John Peterson testified for plaintiff, in substance,

that in 1908 he worked for the John Hancock Mutual Life Insurance Company as a salesman to collect and sell insurance as an agent; that he had a conversation with the insured, John Wilson, about three months before he wrote the insurance; that the insured then informed the witness that he was sick and did not think he would have the examination; that he advised, spoke to Joseph Wilson, who was the then assistant manager of defendant company, the next morning after he had talked with John Wilson, and asked Wilson to see the insured, which Wilson did; that John Wilson the insured, then signed an application for the insurance in the presence of Wilson, and that Wilson filled out the blanks in the application after the insured's name was signed thereto. The witness further testified that he afterwards delivered the insurance policies to the insured. This witness also stated that he told Joseph Wilson that the insured was in a semi-torpid in Will County, but that the agent said "he is all right, go ahead and visit him, we need the business."

Joseph A. Wilson, a witness for the defendant, testified

that he was assistant manager for the John Hancock Mutual Life Insurance Company, had known for four years and that his home was in Joliet, Illinois. This witness was shown the application for insurance made by John Wilson. The witness identified his own signature as the defendant as testified in substance as follows:

"I solemnly swear and depose that the facts and circumstances as stated, and that I witnessed the signature



thereto and collected one week's premium on the 3rd day of October 19\_\_."

This witness also testified that he saw Briuben when an inspection was made of the condition of Briuben, and the witness identified the report made thereon; that he, the witness filled it out at the address of the insured on Collins Street in Joliet; that he asked the insured certain questions, and as he Briuben, answered them, the witness wrote down the answers. He testified that prior to the time of the application he did not know that the applicant was sick, or that he had been in a sanitarium. The inspection report signed by Briuben and the assistant manager, Rigoni, as set forth, contain the statement that applicant had never suffered from tuberculosis. There seems to be little doubt, however, but that Rigoni the assistant manager of this company, was fully apprized of the applicant's condition before the policies in question were issued, and that the premiums payable were received by him under such circumstances. At any rate, the jury evidently so found, so that the only question for this court to determine is whether or not, as a matter of law, the defendant is bound by the condition its agent created. Some of the cases cited by defendant are in point on this question, as some of the facts in any of these cases are at all similar to those submitted to the jury in the instant case.

In Luke Grain Co. v. Illinois Bankers Life Ins'n., 363 Ill. App. 376, cited <sup>by plaintiff</sup>, suit was brought on an insurance policy, and the defense was the same, in effect, as that urged here. In that case, the applicant for insurance apprized the agent of the company of his physical condition and as to certain physical defects and illnesses, and in passing upon the question as to the liability of the insurance company, the court said:

"From the facts in evidence, it is apparent that defendant was apprized of the physical condition of Luke. Notwithstanding such knowledge, Dr. Eberole, medical

There was no evidence one witness standing on the 1st day of October 1911.

This witness also testified that he saw Weinman when an inspection was made of the condition of Weinman, and the witness identified the report made therein; that he, the witness filled it out at the address of the insured on Collins Street in Toledo; that he asked the insured certain questions, and he was thinking, somewhat then, the witness were then the answers. He testified that when at the time of the examination he did not know that the applicant was sick, or that he had been in a sanatorium. The inspection report signed by Weinman and the assistant manager, Alton, as set forth, contains the statement that applicant had never suffered from tuberculosis. There seems to be little doubt, however, that when the assistant manager of this company, who fully apprised of the applicant's condition before the witness in question was named, and that the testimony received by him under such circumstances. As to the fact, the jury evidently so found, so that the only question for the court to determine is whether or not, as a matter of law, the statement is bound by the condition it is not created. None of the cases cited by defendant are in point on this question, as none of the facts in any of these cases are at all similar to those submitted to the jury in the instant case.

In John Smith Co. v. Illinois State Bank, 111 Ill. 225, 226.

It is also held in Ill. v. Smith, 111 Ill. 225, 226, that the witness was the same, in effect, as that urged here. In that case the applicant for insurance advised the agent of the company of his physical condition and as to certain physical defects and illnesses, and is holding upon the question as to the liability of the insurance company, the same facts.

There is little in evidence, it is contended that defendant was entitled to the physical condition of the insured, and that the witness was not entitled to the physical condition of the insured.

director of defendant company, rated up the insured's age from 58 to 60 years and the annual premium from the regular rate of \$532 to \$563.30, approved the application, and the policy was issued. The application was marked 'Rated up one year on account of physical impairment,' and Dr. Eberhart admitted that the impairment meant the condition of the insured's heart. He was what is known as a sub-standard risk, and defendant took the increased risk for the increased compensation. When defendant issued the policy with the knowledge that the insured was not in sound health, it is not entitled to avail itself, as a defense, of that provision of the policy which limited its liability if the insured was not in sound health at the time the policy was issued, and it is immaterial what caused such condition of health on the part of the insured. (*Bering v. Prudential Ins. Co.*, 123 Ill. App. 26, 120 Ill. App. 304; *Eagleton v. Prudential Ins.* 123 Ill. App. 305.)

The eleventh plea is based upon a clause in the application for the policy which reads, 'I agree that the insurance herein applied for shall not take effect until the first premium is actually paid and the policy is issued and delivered to me during my good health.' Proof that the deceased was in good health is not a condition precedent to a right of recovery. (*Middleton v. North American Protective Ass'n.* 260 Ill. App. 286; *Fairfield v. Union Life Ins. Co.*, 125 Ill. App. 7.) My defendant's course of pleading, it assumed the burden of proving that the insured was not in good health at the time of his application for insurance, and that defendant was not apprised of that fact. This it failed to do, and is not in a position to claim that the court erred in refusing to direct a verdict in its favor. (*West v. Franklin Ins. Co.*, 245 Ill. App. 124.)" (Italics ours)

In view of these authorities, and of all the circumstances surrounding the issuing of these insurance policies, and the fact that the general agent of the insurance company accepted the premiums payable, presumably with full knowledge of the condition of the applicant, we feel that the verdict of the jury should not be disturbed. The judgment of the Municipal Court is, therefore, affirmed.

AFFIRMED.

WILSON AND HEBEL, JJ. CONCUR.



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is view of these conditions, and of all the circumstances surrounding the making of these financial policies, and the fact that the financial policy of the Government is not a matter of mere expediency, but a matter of principle, and that the financial policy of the Government is not a matter of mere expediency, but a matter of principle, and that the financial policy of the Government is not a matter of mere expediency, but a matter of principle.

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30549

AETNA MORTGAGE & SECURITY COMPANY,

Appellee,

v.

FILSON RAILROAD RAIL COMPANY,  
corporation,

Appellant.

MUNICIPAL COURT

OF CHICAGO.

274 I.A. 656<sup>1</sup>

Opinion filed March 14, 1934

MR. PRESIDING JUSTICE SALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of the Municipal Court of Chicago in trover, against defendant for the sum of \$280.00. The trial was before the court upon an amended statement of claim.

The statement of claim alleges that the Aetna Mortgage & Security Company on the 2nd day of May, 1931, was lawfully entitled to possession of certain goods and chattels described of the value of \$425.00, by virtue of a chattel mortgage executed on the 17th day of March, 1931, by Andrew Andressen, acknowledged by him before the Clerk of the Municipal Court of Chicago and recorded in the Recorder's Office of Cook County on the 17th day of March, 1931; that said mortgage conveyed the property described, among other properties, to M. E. Landfield as security for an unpaid balance due of \$1,800.00; that on the 17th day of March, 1931, the chattel mortgage, together with the notes which it was given to secure, were assigned and delivered to the Aetna Mortgage & Security Company, plaintiff; that with full knowledge of the lien of the chattel mortgage, defendant took the goods described out of the possession of the mortgagor and out of the possession of the plaintiff, and that defendant, though often requested, has refused to deliver up to plaintiff the goods described.

In its affidavit of merits defendant stated that it had obtained a judgment in the Municipal Court of Chicago on January 27th, 1931, against Andrew Andressen for \$2.25 and costs, obtained an execution from the Clerk of the Municipal Court of Chicago on March

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374 L.A. 656

Opinion filed March 14, 1934

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2nd, 1931, and placed the same in the hands of the Bailiff of the Municipal Court of Chicago for service on March 7th, 1931; that this execution was served on Andrew Andresen on March 10th, 1931, by the Bailiff of the Municipal Court; that on April 17th, 1931, a levy was served on Andrew Andresen by such Bailiff, and that the goods and chattels, for the conversion of which plaintiff brings this action, were taken possession of by such Bailiff and by virtue of the levy and execution the Bailiff sold these chattels, to the defendant on May 1st, 1931, as provided by law, for the sum of \$2.00 and delivered the property to the defendant, together with a bill of sale as evidence thereof. Defendant further alleges that it had no knowledge of any lien, claim or rights of the plaintiff to the chattels described prior to May 2nd, 1931, and denied that the plaintiff had the right of possession of these chattels, and denied that it had converted the same, as alleged.

Plaintiff's theory is that its chattel mortgage lien is superior and prior to the lien of the defendant.

Defendant's theory is that at the time of the recording of the chattel mortgage on March 17th, 1931, upon which this suit is predicated, a judgment had been obtained by the defendant against Andrew Andresen, the mortgagor, for the sum of \$23.85 on January 27th, 1931, and that on March 7th, 1931, when defendant placed its execution dated March 2nd, 1931, in the hands of the Bailiff of the Municipal Court of Chicago for service, it had perfected its lien on any personal property of Andrew Andresen which he then owned and which he became owner of, during the life of the execution, and that it had the right to cause the Bailiff to make the levy on the personal property in the possession of Andrew Andresen on April 17th, 1931, and by virtue of any such levy to sell the same at public sale, as was done. Further, defendant's theory is that this lien was superior to the lien obtained by the plaintiff on March 17th, 1931, by virtue of the chattel

and, 1931, and placed the same in the hands of the plaintiff at the  
Municipal Court at Chicago for service on March 1931; that  
this execution was served on Andrew Anderson on March 1931, by  
the plaintiff of the Municipal Court; that on April 1931, a levy  
was served on Andrew Anderson by said plaintiff, and that the goods  
and chattels, for the satisfaction of which plaintiff brings this action,  
have been possession of by said plaintiff and by virtue of the levy  
and execution the plaintiff sold these chattels, to the defendant on  
May 1931, as provided by law, for the sum of \$25.00 and delivered  
the property to the defendant, together with a bill of sale as  
witness thereof. Defendant further alleges that it had no knowledge  
of any lien, claim or right of the plaintiff to the chattels described  
prior to May 1931, and denied that the plaintiff had the right  
of possession of these chattels, and denied that it had conveyed  
the same as alleged.  
Plaintiff's theory is that its chattel mortgage lien is  
superior and prior to the lien of the defendant.  
Defendant's theory is that at the time of the recording of  
the chattel mortgage on March 1931, when said lien was  
perfected, a judgment had been obtained by the defendant against  
Andrew Anderson, the mortgagor, for the sum of \$25.00 on January 1931,  
and that on March 1931, when defendant placed its execution  
in the hands of the plaintiff of the Municipal  
Court at Chicago for service, it had perfected its lien on any  
personal property of Andrew Anderson which he then owned and which he  
had not sold or, during the life of the execution, and that it had the  
right to cause the plaintiff to make the levy on the personal property  
in the possession of Andrew Anderson on April 1931, and to  
violate of any such levy to sell the same at public sale, as was done.  
Plaintiff's theory is that this lien was superior to the lien  
obtained by the plaintiff on March 1931, by virtue of the chattel



mortgage mentioned, and that unless plaintiff could show it had title and retained possession of the chattels described in the mortgage until after its purported chattel mortgage was filed for record in the Recorder's Office of Cook County, defendant's lien was prior and superior to the lien obtained by the plaintiff.

Other than the notes and mortgage, the only proof offered by the plaintiff was that of a person employed by the loan department of the Metropolitan Credit Discount Corporation, who testified that in his opinion, the fair cash market value of the items mentioned on May 2nd, 1931, was about \$1200.00; that on May 2nd, 1931, he was employed by the plaintiff, and that on May 2nd, 1931, he saw the property in question in the possession of Andrew Androsen.

It was stipulated that the judgment of defendant against Andrew Androsen had been entered on January 27th, 1931, execution issued on March 2nd, 1931, placed in the hands of the Sheriff on March 7th, 1931, served on Andrew Androsen on March 10th, 1931, a return thereon was made by the Sheriff of the Municipal Court of Chicago on June 13th, 1931, and there is no dispute, but that defendant through this levy received a bill of sale for the property mentioned from the Sheriff of the Municipal Court of Chicago.

Plaintiff's position is that, inasmuch as the chattel mortgage in question was given to the mortgagee to secure the payment of the amount claimed to be due for the chattels in question, that it created a prior lien to that of the execution creditor, even though the execution was in the hands of the Sheriff for service and levy at the time when the mortgage had not been executed, and when there was nothing to show that the mortgagee claimed a lien thereunder, and Pipes v. Snow, 250 Ill. App. 120, is cited as authority. In that case, the chattel mortgage, which was given to secure the purchase price for the chattels involved, had been executed and recorded before the goods in question were delivered to the mortgagor. The record here



and reported to the men obtained by the plaintiff.  
in the Secretary's office of each County defendant's list was made  
and until after the purported chattel mortgage was filed for record  
title and was filed possession of the chattels described in the mort-  
gage was maintained, and that neither defendant's name nor name

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of the International Health Research Commission, the Committee that  
is his office, and this was the first time that the Commission  
by the year 1951, and then in 1952, and in 1953, he was  
employed by the Ministry, and then in 1954, he was the  
chief in charge in the position of Chief Engineer.

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shows that on March 7th, 1931, the chattels in question were in the possession of the judgment debtor, Andrew Andresen. The record further shows that on that date, to-wit: March 7th, 1931, the execution issued on defendant's judgment against Andresen had been placed in the hands of the bailiff of the Municipal Court for levy, and that the chattel mortgage, on which this action is predicated, had not been executed, so the case cited is not authority. From the record in the instant case, we draw the conclusion that the goods in question had been sold and delivered to Andresen before any of the transactions here had taken place, that at the time of defendant's judgment and the placing of the execution in the hands of the bailiff, Andresen was in possession of these chattels, and that the bill of sale and mortgage were an afterthought. In this state it has never been held otherwise than that the lien of an execution attaches to personal property of a judgment debtor when such execution is delivered to the sheriff, bailiff or constable to execute. Logley v. Gernak, 309 Ill. App. 431.

We hold that the lien of the defendant is and was superior to the lien of the chattel mortgage. The judgment of the Municipal Court is, therefore, reversed with the direction that the court enter a judgment in conformity with the views expressed in this opinion.

REVERSED AND REMANDED.

WILSON AND HEBEL, JJ. CONCUR.

shows that on March 19th, 1901, the certificate in question was in the possession of the judgment debtor, Andrew Anderson. The record further shows that on that date, to-wit: March 19th, 1901, the execution issued on Anderson's judgment against Anderson had been placed in the hands of the sheriff of the San Joaquin County Jail, and that the sheriff's receipt, on which this action is predicated, had not been executed, as the case cited is not authority. From the record in the instant case, we then are convinced that the goods in question had been sold and delivered to Anderson before any of the transactions here had taken place, that at the time of defendant's judgment and the taking of the execution in the hands of the sheriff, Anderson was in possession of these goods, and that the bill of sale and mortgage were not then in existence. In this state it has been held that the lien of a judgment debtor when such execution is delivered to the sheriff, passes to the sheriff, and is not subject to the lien of the judgment debtor. See People v. Latham, 202 Cal. 421.

We hold that the lien of the defendant in and on the goods is superior to the lien of the sheriff's mortgage. The judgment of the court is reversed, and the case is remanded with the instruction that the court enter a judgment in conformity with the views expressed in this opinion.

APPROVED AND FORWARDED:

WILLIAM H. HARRIS, J., JUDGE.



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26550

PEOPLE OF THE STATE OF ILLINOIS,  
ex rel. JOHN W. CALHOUN,

Appellee,

v.

RICHARD J. COLLINS, et al.,

Appellants.

APPEAL FROM

CIRCUIT COURT

274 I.A. 656<sup>2</sup>

COOK COUNTY.

Opinion filed March 14, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This case was consolidated with case No. 26558. The questions involved there are the same as those involved here, and the views expressed in that opinion are conclusive as to the questions raised here. The order of the court in this case will be the same as is made in case No. 26558. The judgment of the Circuit Court is reversed.

Reversed.

WILSON AND NEBEL, JJ. CONCUR.

Opinion filed March 14, 1934

36560

PEOPLE OF THE STATE OF ILLINOIS,  
ex rel. ARTHUR J. CLEMENTS,

Appellee,

v.

RICHARD J. COLLIER, et al.,

Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

274 I.A. 656<sup>3</sup>

Opinion filed March 14, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This case was consolidated with case No. 36558. The questions involved there are the same as those involved here, and the views expressed in that opinion are conclusive as to the questions raised here. The order of the court in this case will be the same as is made in case No. 36558. The judgment of the Circuit Court is reversed.

ATTORNEYS.

WILSON AND HARRIS, JJ. CONCUR.



BOOK

BOOKS OF THE STATE OF ILLINOIS  
OF THE COUNTY OF JEFFERSON

1894-1895

RICHARD J. WILLIAMS, et al.

Appellants.

WILLIAM HENRY

Respondent.

Case No. 1777

274 I.A. 656

Opinion filed March 14, 1934

BY THE COURT: JUSTICE WILLIAMS delivered the opinion of the court.

This case was consolidated with case No. 25558. The

questions involved there and the facts as therein involved here, and

the views expressed in that opinion are conclusive as to the

questions raised here. The issue of the court in this case will

be the same as in case No. 25558. The judgment of the

Illinois Court is reversed.

Reversed.

ILLINOIS LAW BOOK CO., CHICAGO

38881

PEOPLE OF THE STATE OF ILLINOIS,  
ex rel. JOHN W. SAVIN,

Appellee,

v.

CITY OF CHICAGO, et al.,

Appellants.

APPELLATE

CIRCUIT COURT

COOK COUNTY.

274 I.A. 656<sup>4</sup>

Opinion filed March 14, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This case was consolidated with case No. 36558. The questions involved there are the same as those involved here, and the views expressed in that opinion are conclusive as to the questions raised here. The order of the court in this case will be the same as is made in case No. 36558. The judgment of the Circuit Court is reversed.

REVEREND.

WILSON AND REBEL, JJ. CONCUR.

1934

RECEIVED BY THE CITY OF CHICAGO  
ON APRIL 1, 1934

CHICAGO

CITY OF CHICAGO, ILL.

STATE OF ILLINOIS

3741 A. 656

Opinion filed March 14, 1934

RE. PETITION FOR WRIT OF HABEAS CORPUS FOR JAMES EARL RAY.  
 This case was consolidated with case No. 33358. The  
 questions involved there are the same as those involved here, and  
 the facts presented in that case are material to be the  
 questions raised here. The story of the case in this case will  
 be the same as is told in case No. 33358. The judgment of the  
 circuit court is affirmed.

CHICAGO

CLERK OF THE COURT, CHICAGO



36573

FRANK A. ROSE,

Appellee,

v.

WALTER H. BRIDGEMAN,

Appellant.

RECEIVED FROM  
CIRCUIT COURT

OF COOK COUNTY.

274 I.A. 657<sup>1</sup>

Opinion filed March 14, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment of the Circuit Court of Cook County for \$1,500.00 in a suit brought by plaintiff against defendant to recover for injuries sustained by the alleged negligence of the defendant. The trial was by a jury. There is no question of pleading involved, neither is there any question raised as to the amount of the verdict, nor objection made to any instruction given or refused. The action grew out of a collision between the automobiles of plaintiff and defendant at the intersection of two paved highways. It is insisted by defendant that the verdict was contrary to the manifest weight of the evidence.

On August 17th, 1931, plaintiff was driving an automobile east on Oakton Street at the intersection of Oakton Street and Milwaukee Avenue. Oakton Street runs east and west. Milwaukee Avenue is a paved four lane traffic state highway, designated as "State Highway 21," and runs in a northerly direction from the city of Chicago. The intersection where the accident occurred is in Maine Township, Cook County, and not within the limits of any incorporated city or village. Defendant was driving north on Milwaukee Avenue. The record shows that the area surrounding the intersection is sparsely built up, and that there is nothing to obstruct the view south from Oakton Street, except a large sign and some trees. The record shows that the accident occurred between 3 and 3 o'clock in the afternoon of a bright sunny day.

Plaintiff testified in substance that when he arrived at this intersection, he was sitting on the left side of the car and

Opinion filed March 14, 1934

274 I.A. 657

MR. JUSTICE LILLIAN delivered the opinion of the court.

This is an appeal of the judgment of the Circuit Court of Cook County No. 11,800, which is a writ brought by plaintiff against defendant to remove the defendant's automobile from the defendant's premises. The trial was by a jury. There is no question of liability involved, neither is there any question raised as to the amount of the verdict, nor objection made to any instruction given or refused. The action grew out of a collision between the automobile of plaintiff and defendant at the intersection of two paved highways. It is insisted by defendant that the verdict was contrary to the weight of the evidence.

On August 17th, 1932, plaintiff was driving an automobile east on Madison Street at the intersection of Madison Street and Chicago Street. Madison Street runs east and west. Chicago Street is a paved four lane traffic state highway, designated as "State Highway 11", and runs in a northerly direction from the city of Chicago. The intersection where the accident occurred is in plain view, and not within the limits of any incorporated city or village. Defendant was driving north on Milwaukee Avenue. The record shows that the area surrounding the intersection is generally built up, and that there is nothing to obstruct the view south from Chicago Street, except a large sign and some trees. The record shows that the accident occurred between 2 and 3 o'clock in the afternoon of a bright sunny day.

Plaintiff testified in substance that when he arrived at this intersection, he was sitting on the left side of the car and

his wife on the right side, and as they approached Milwaukee Avenue they were driving at a speed of about 30 miles an hour. He also stated that before he came to Milwaukee Avenue he stopped and looked around and did not see any car, except two cars coming from the north going south, and that he then started east across Milwaukee Avenue at a speed of about 5 miles an hour, and that just as he was crossing and nearly over Milwaukee Avenue, defendant's car came at high speed and struck plaintiff's car on the right side and threw it around towards the north on Milwaukee Avenue, and that defendant's car swerved and went east on Oakton Street and to the north. He stated that defendant's car finally stopped on Oakton Street about 200 feet from the crossing on the curb, and that his car was thrown about 75 feet from the crossing; that it went probably 100 feet north after it was struck, and that plaintiff's car finally stopped on the east side of Milwaukee Avenue. He stated further that his car was struck on the right side in the center.

On cross-examination, plaintiff testified that he had lived in the vicinity of the north side of Chicago for 40 years; that he had occasion to drive out on Oakton Street quite often, and that he had travelled that street a number of times during the summer in question. He stated that Oakton Street at the point in question is about 100 feet wide, is a four lane highway, as is Milwaukee Avenue at the same point. He also stated there were no particular obstacles at the intersection to obstruct the vision of motorists approaching the point from either Milwaukee Avenue or Oakton Street; that about 500 or 600 feet south of the intersection the road on Milwaukee Avenue is deeper, that there is a kind of a swale in the road, but that it is not deep enough to obstruct the vision from Oakton Street. He also stated that there was a stop sign, stopping traffic on Milwaukee Avenue before it entered the intersection to cross Oakton Street. Plaintiff also testified that he knew Milwaukee



his wife on the right side, and as they approached Milwaukee Avenue they were driving at a speed of about 30 miles an hour. He also stated that before he came to Milwaukee Avenue he stopped and looked around and did not see any car, except the one coming from the north going south, and that in fact stopped west of the Milwaukee Avenue intersection. He stated that he was driving at a speed of about 30 miles an hour, and that just as he was crossing and nearly over Milwaukee Avenue, Detenmund's car came at high speed and struck Reinhart's car on the right side and threw it around towards the north on Milwaukee Avenue, and that Detenmund's car stopped and went east on Madison Street and to the north. He stated that Detenmund's car finally stopped on Madison Street about 300 feet from the crossing on the north, and that his car was thrown about 75 feet from the crossing; that it went probably 100 feet north after it was struck, and that Reinhart's car finally stopped on the east side of Milwaukee Avenue. He stated further that his car was struck on the right side in the center.

On cross-examination, Reinhart testified that he had lived in the vicinity of the north side of Chicago for 30 years; that he had occasion to drive out on Madison Street often, and that he had observed that street a number of times during the summer in question. He stated that Madison Street at the point in question is about 100 feet wide, is a two-lane highway, and is Milwaukee Avenue at the same point. He also stated there were no particular obstacles at the intersection to obstruct the vision of motorists approaching the point from either Milwaukee Avenue or Madison Street; that about 200 or 300 feet south of the intersection the road on Milwaukee Avenue is narrow, that there is a kind of a curve in the road, and that it is not easy to see around the corner from Madison Street. He also stated that there was a stop sign, stopping traffic on Milwaukee Avenue before it entered the intersection so that cars coming from Milwaukee Avenue would be aware of the intersection.

Avenue was a state highway and designated as such by the officials of the Road Department of the State of Illinois; that he came to a full stop about 100 feet from the edge of the cement slab on Milwaukee Avenue, and proceeded at a rate of about 3 miles an hour until he was about two thirds across Milwaukee Avenue, at which point defendant's car ran into his car; that he could see 300 or 350 feet down Milwaukee Avenue from that point; that he saw no car in sight, that he looked again before entering Milwaukee Avenue and continued looking south until the accident happened; that he did not see defendant's car before it struck; that defendant's car came so fast that he did not see it until just before it hit him. He also testified that he never told anybody at any time since the accident that he didn't stop before he went on the pavement, and that he never signed any statement to that effect. At this point, plaintiff was shown defendant's Exhibit No. 1 in the record, and he then stated that his signature appeared on both pages of this document, that he signed both pages, and that he did not understand the contents of it when he signed it, that he did not read it over, but that maybe it was read to him, but that he did not think so, that he signed the statement blindly, that the man who presented the statement to him asked him questions, wrote the answers down and then showed it to the plaintiff, that he signed it, and that at that time he was in the hospital.

Ray J. Thompson, a witness produced on behalf of plaintiff, testified that at the time and near the place in question he was driving a car south on Milwaukee Avenue and north of the intersection of Milwaukee Avenue and Oakton Street at about 3 o'clock in the evening; that when he was about 400 feet north of the intersection of Milwaukee Avenue and Oakton Street he saw a car pull out directly in front of him coming from the west and going east on Oakton Street; that he, the witness, was driving on the west side of Milwaukee Avenue, and that he saw two cars come together; that he was about 150 feet





north from the point of the accident when it happened; that after the collision, plaintiff's car had been driven east on Milwaukee Avenue perhaps 125 feet, and that defendant's car swerved to the right and proceeded about 75 feet over the concrete to the dirt side of the road; that before the accident defendant's car was coming north, that he the witness, had a clear vision down Milwaukee Avenue beyond the intersection, that the impact occurred on the east side of Milwaukee Avenue, and that plaintiff's car had almost crossed Milwaukee Avenue at the time of the accident. He stated that plaintiff's car was going about 18 miles an hour, and that he did not see defendant's car until the time of the impact.

Defendant testified that at the time of the accident, he was going north on Milwaukee Avenue, a four lane highway, and that at the northwest corner of the intersection of Milwaukee Avenue and Oakton Street there is a real estate office, and that there are no buildings of any kind on the other corners. He stated there were no stop signs at the intersection of Milwaukee Avenue and Oakton Street to stop the traffic on Milwaukee Avenue, but that there were stop signs to stop the traffic going east and west on Oakton Street, that he first observed plaintiff's car as he reached the west side of Milwaukee Avenue; that there is a large sign which obstructs the view a little bit and a few trees along the west side of Milwaukee Avenue which also obstruct the view; that he did not see plaintiff's car until it was quite close to Milwaukee Avenue, and at that time he was about 100 feet south of the south line of the intersection of the two streets. He stated that plaintiff was traveling between 50 or 60 miles an hour, and that plaintiff did not stop at the intersection; that he, defendant, thought plaintiff was going to stop or slow down because of the character of the street, and that when he saw plaintiff coming at a fast speed, he, defendant, applied the brakes as fast as he could, that he tried to turn, but could not clear defendant's car, and that plaintiff hit his car on the side

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North from the point of the accident when it happened; that after the collision, Plaintiff's car was driven west on Milwaukee Avenue towards 12th Street, and that Defendant's car moved to the right and proceeded about 75 feet over the concrete to the left side of the road; that between the accident and Plaintiff's car was moving north, that he saw Plaintiff's car moving west on Milwaukee Avenue between the intersection, that the car was moving on the west side of Milwaukee Avenue, and that Plaintiff's car had almost crossed Milwaukee Avenue at the time of the accident. He stated that Plaintiff's car was going about 15 miles an hour, and that he did not see Defendant's car until the time of the impact.

Defendant testified that at the time of the accident, he was driving on Milwaukee Avenue, a westbound lane, and that at the northeast corner of the intersection of Milwaukee Avenue and Madison Street there is a well known office, and that there are no buildings of any kind on the other corner. He stated there were no other signs of the intersection of Milwaukee Avenue and Madison Street to stop the traffic on Milwaukee Avenue, but that there were other signs to stop the traffic going east and west on Madison Street, that he first observed Plaintiff's car as he rounded the west side of Milwaukee Avenue; that there is a large sign which obscures the view a little bit and a few trees along the west side of Milwaukee Avenue which also obstruct the view; that he did not see Plaintiff's car until it was well along on Milwaukee Avenue, and at that time he was about 100 feet south of the south line of the intersection of the two streets. He stated that Plaintiff was traveling between 50 or 55 miles an hour, and that Plaintiff did not stop at the intersection; that he, Defendant, thought Plaintiff was going on when he saw the car because of the character of the street, and that when he saw Plaintiff's car as a westbound car, Defendant, recalled the car as if he was going, that he tried to turn, but could not turn because of the way the westbound car was on the side

and his car swerved to the right against a lamp post. This witness testified that Milwaukee Avenue is level south of the intersection for 2,000 feet or more; that there is no dip in the road or perceptible rise, and that the road is practically level from miles to the intersection. Defendant also introduced in evidence, without objection, plaintiff's exhibit 1 above referred to, a written statement signed by the plaintiff in which it is stated that prior to the accident in question, plaintiff was going east on Carlton Street at a speed of about 20 miles an hour, and that as he approached Milwaukee Avenue he looked both north and south and did not see any cars coming in either direction, and that he did not stop and went right on, that he got a glance of a car to his right and about 5 feet from his car, and then the crash came, and that each car ran about 20 feet after the accident before they stopped.

The only disinterested witness to the accident was Thompson, the driver of the oil truck. He testified that plaintiff's car pulled into Milwaukee Avenue slowly; that it had crossed east over the first, second and third lanes of Milwaukee Avenue at about 15 miles an hour before the accident, indicating that plaintiff was driving slowly and was using care in crossing Milwaukee Avenue, and that plaintiff had not come into the intersection at a high rate of speed, as testified by defendant. If it is true that plaintiff had reached almost the extreme east side of Milwaukee Avenue, a four lane highway, before the accident occurred, this fact alone suggests that defendant had ample space and was driving in a negligent manner, or the accident could not have happened. At any rate, the jury saw and heard the witnesses and as the verdict is not against the manifest weight of the evidence, we see no reason to disturb it. The judgment is, therefore, affirmed.

AFFIRMED.

WILSON AND HERBEL, JJ. CONCUR.



and then the man came, and that was about 10 feet after the  
he got a glance at a car in his right and about 1 foot from his car,  
right direction, and that he did not see and went right on, that  
he looked both ways and went and did not see any more coming in  
about 20 miles an hour, and that he had answered witnesses saying  
direction, slightly was going east on Cedar Street at a speed of  
by the plaintiff is shown in a sketch that is in the exhibit in  
plaintiff's exhibit I have enclosed in a letter addressed about  
section. Defendant has introduced in evidence, without objection,  
also, and that the road is practically level from side to the main-  
the 1,000 feet or more, that there is no dip in the road or undulation  
testified that defendant's version is correct of the intersection  
and his car stopped at the light against a lamp post. This witness

[illegible]

12-11-1944

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MAURICE WEISZ,

Appellee,

v.

SILVER CREEK COAL COMPANY, a  
Corp.,

Appellant.

SUPERIOR COURT

COOK COUNTY.

274 I.A. 657<sup>2</sup>

Opinion filed March 14, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment in a personal injury suit brought against it by plaintiff. A trial was had in the Superior Court of Cook County before a jury, and a verdict of \$2,000 was returned, upon which verdict the judgment was entered.

The declaration in the case contains five counts: (1) charges general negligence; (2) operation of a truck of defendant at an excessive rate of speed; (3) operation of the truck without lights; (4) violation of the right of way statute, and (5) willful and wanton operation of the truck. Pleadings of the general issue of non-ownership and non-operation were filed by defendant. Defendant produced no witnesses, and at the close of plaintiff's case, moved the court to direct the jury to find the defendant not guilty, which motion was denied. The case was submitted to the jury, which returned the verdict as stated. There is no question raised here as to the amount of damages, nor as to any instructions given or refused. The points urged as grounds for reversal are that plaintiff was guilty of contributory negligence at the time and place in question, and that the court erred in submitting the case to the jury on all the counts of the declaration, including the count charging willfulness and wantonness.

Plaintiff testified in substance that on November 28th, 1930, he was driving an automobile west on the north side of 37th Street, near the intersection of that street and LaSalle Avenue in

241A.657

Opinion filed March 14, 1934

... This case presents the question of a judgment ...  
... in a personal injury suit brought against it by plaintiff, a ...  
... in the superior court of Cook County before a jury ...  
... and a verdict in favor of plaintiff, which was affirmed by the ...  
... court.

The question in the case consists of two points: (1) ...  
... charges general negligence; (2) recovery of a sum of ...  
... as an excessive rate of interest; (3) recovery of the ...  
... interest; (4) violation of the right of way statute; and (5) ...  
... and certain questions of fact. ...  
... an examination of the ...  
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the City of Chicago; that when he came to the east side of LaSalle Avenue, he came to a stop, looked at all the corners, saw nothing coming, and that he then proceeded to cross the street; that the next thing he knew he was underneath the rear wheel of a truck at a point about 15 feet north of 57th Street on the west side of LaSalle Avenue; that he was taken from there to a doctor; that at the time of the accident, the street lights had not been turned on, and that after the accident he saw defendant's truck there with no lights on. On cross-examination, plaintiff stated that he did not know whether the lights were burning on 57th Street at the time of the accident or not, and that as he crossed LaSalle Avenue he was going 15 miles an hour. He stated that the truck in question came from the south.

Lewis Gufenchard, a witness for plaintiff, testified in substance that he was on the corner of 57th Street and LaSalle Avenue at the time of this accident; that the nearest light to the place in question was on the northeast corner of the streets; that when plaintiff came to the corner, he, plaintiff, slowed down almost to a stop; that the truck was then coming north on LaSalle Avenue, and that on the left or west side of the truck and opposite to the direction from which plaintiff was coming, he saw a little lantern hanging about 5 feet from the ground, and that the witness next saw the truck on top of plaintiff's automobile. On cross-examination, this witness stated that the truck was about 60 feet from 57th Street when plaintiff's car came up to the corner.

While there is nothing in the record to indicate the time of the accident, it seems to be assumed by both parties that it was after dark.

The first question to be determined is whether or not as a matter of law the record indicates that plaintiff's alleged negligence approximately contributed to the accident, or whether, in fact, he was guilty of any negligence at all. It is already stated by the

the City of Chicago; that when he came to the west side of Jackson Avenue, he came to a stop, looked at all the corners, saw nothing coming, and that he then proceeded to cross the street; that the next thing he knew he was underneath the rear wheel of a truck at a point about 15 feet north of 57th Street on the west side of Jackson Avenue; that he was then two feet or more away from the truck at the moment, the street lights had not been turned on, and that after the accident he saw defendant's truck came with no lights on. On cross-examination, Plaintiff testified that he did not know whether the lights were burning on 57th Street at the time of the accident or not, and that as he crossed Jackson Avenue he was going 15 miles an hour. He stated that the truck in question came from the north. Louis Weinbaum, a witness for Plaintiff, testified in

testimony that he was on the corner of 57th Street and Jackson Avenue at the time of this accident; that the nearest light to the place in question was on the southeast corner of the street; that when Plaintiff came to the corner, he, Plaintiff, slowed down almost to a stop; that the truck was then coming north on Jackson Avenue, and that on the left or west side of the truck and opposite to the direction from which Plaintiff was coming, he saw a little lantern hanging about 8 feet from the ground, and that the witness next saw the truck on top of Plaintiff's automobile. On cross-examination,

the witness stated that the truck was about 15 feet from 57th Street when Plaintiff's car came to the corner. While there is nothing in the record to indicate the time of the accident, it seems to be assumed by both parties that it was after dark.

The first question to be determined is whether or not as a matter of law the record indicates that Plaintiff's alleged negligence was a proximate cause of the accident, or whether, in fact, he was guilty of any negligence at all. As already stated by the

witness Bufenhard, when plaintiff came to the corner of the streets, he, plaintiff, came almost to a stop, and then proceeded slowly east across Dubish Avenue, and that at that time, defendant's truck was coming from the south and was about 60 feet or more south of the intersection, that is to say, defendant's truck was coming from plaintiff's left.

In Riddle v. Mansauer, 254 Ill. App. 88, the court said:

"A driver on the left owes a duty to the driver on his right to approach an intersection with sufficient care to permit the latter to exercise his right of way. (Johnson v. Duke, 247 Ill. App. 372; Zopf v. Kuttan, 228 Ill. App. 406; McCarthy v. Padin, 236 Ill. App. 303; Fisher v. Johnson, 238 Ill. App. 35.) While the right of way does not relieve the one entitled to it from the duty of exercising due care to avoid injuring another, he may assume that persons approaching the intersection on his left will observe the law and respect his right. (Cartridge v. Oberstein, 225 Ill. App. 209; Johnson v. Duke, *supra*.)" (Italics ours)

The record indicates that plaintiff had the right of way, and was not guilty of negligence.

The next point raised by defendant is that the court erred in submitting the willful and wanton count to the jury in the absence of any proof of willfulness and wantonness. There was no action made by defendant at the close of plaintiff's case, nor was any instruction offered by defendant directing the jury to disregard this count in the declaration. The record does not show any evidence of willfulness or wantonness. However, there is an allegation in the declaration to the effect that defendant violated the right of way statute, and that he was driving without sufficient lights, both of which charges are supported by evidence.

In Scott v. Farlin & Grendarff Co., 245 Ill. 469, the Supreme Court cited the case of Olsen v. Kelly Seal Co., 236 Ill. 302, where it <sup>is</sup> said:

"It is settled in this state that one good count in a declaration which is supported by the evidence will sustain a verdict and judgment although other counts in the declaration may not be supported by the evidence."



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IN RE: JAMES V. HANCOCK, JR. AKA. 111 1ST ST. NEW YORK, NY 10003

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The next point raised by defendant is that the court erred in submitting the willful and knowing count to the jury in the absence of any proof of willfulness and knowledge. There was no willful state by defendant at the time of plaintiff's death, nor was any intention inferred by defendant's alleged act. It is therefore this count in the indictment. The court does not show any evidence of willfulness or knowledge. However, there is an allegation in the indictment to the effect that defendant violated the right of way statute, and that he was driving without sufficient lights, both of which charges are supported by evidence.

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\*YOU ALL ARE IN THE WILD \* WORLD TO COME AND SEE

1. The above information was obtained from the files of the FBI, New York Office, and is being furnished to you for your information.

See also Quinn v. DeCamp Coal Co., 343 Ill. 275, where the Supreme Court said:

"The declaration charged that the appellant 'negligently, carelessly and willfully' did the things complained of, causing the death of Antonopoulos. The proof does not tend to show that the act was willfully done, and counsel for appellant argues that there was a variance between the proof and the declaration, and that therefore the motion made at the close of plaintiff's evidence for an instruction to find appellant not guilty should have been granted. In tort the plaintiff may prove a part of his charge if the averment is divisible, and proof of a part of the allegations, if sufficient to sustain a case, will sustain a judgment. (City of Joliet v. Johnson, 177 Ill. 173; LaSalle Railroad Co. v. Williams, 312 id. 37; City of Cook Island v. Quincy, 128 id. 408; New York, Chicago and St. Louis Railroad Co. v. Almsuthal, 160 id. 40.) In this case, if the proof showed that the act was caused by the negligence of appellant, recovery could be had even though the negligence was not wanton or willful."

The cause was fairly submitted to the jury, and we see no reason for disturbing the verdict and judgment. The judgment is, therefore, affirmed.

AFFIRMED.

WILSON, J. AND HEBEL, J. CONCUR.





36592

EDWARD MENKIN,

Plaintiff-Appellee,

v.

MURIEL CONNELLY and HERMAN F.  
WINKELMAN,

Defendants.

\_\_\_\_\_  
In Re Appeal of HERMAN F. WINKELMAN,  
Defendant-Appellant.

MUNICIPAL COURT

OF CHICAGO.

274 I.A. 657

Opinions filed March 14, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by Herman F. Winkelman from an order of the Municipal Court of Chicago entered after a hearing, denying his motion "to expunge or vacate order of November 2nd, 1932," in said cause, and denying defendant's motion for leave to file instanter an amended affidavit of assets. The order appealed from was entered December 3rd, 1932, on motion of defendant quia pro tunc as of November 28th, 1932.

On April 6th, 1932, under warrant of attorney contained in a lease signed by defendant and Muriel Connelly, a judgment was entered against both defendants for the sum of \$500.00 for rent then due and owing to the plaintiff by the terms of this lease. On petition of defendant, Winkelman, an order was entered giving him leave to appear and make a defense, and ordering the judgment to stand as security, and that execution be stayed until the further order of the court. The petition upon which the order was entered recites among other things that the defendant, Winkelman, is 30 years of age and has never had any experience in business; that plaintiff drafted the lease in pursuance of an understanding had between plaintiff and defendants; that the defendant, Winkelman, at the solicitation of the plaintiff, and without reading the lease, and without any consideration, signed his name as guarantor, as he understood it,

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Opinions filed March 14, 1934

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and for no other purpose; that Winkelman is obliged to use spectacles or eye glasses when reading, and that he did not have the use thereof at the time of the execution of the lease; that he, defendant, stated to plaintiff at that time his need of glasses, and that plaintiff then stated to Winkelman that it was unnecessary and hurriedly urged Winkelman to sign the lease; that Winkelman did not know of the provisions thereof, nor of the capacity in which he signed the same.

After the judgment was opened up, defendant on June 10th, 1932, filed what is referred to as an amended statement of claim, in which he sets up among other things various alleged facts concerning the income of the property described in the lease, upon which the judgment was entered, as an alleged set-off against plaintiff's claim. On November 2nd, 1932, on motion of plaintiff, this alleged set-off was stricken, and the court then and there entered the following order:

"Now comes the plaintiff in this cause, the defendant being absent and not represented and thereupon this cause comes on in regular course for trial before the Court, without a jury, and the Court having heard the evidence, and the arguments of counsel, and being fully advised in the premises enters the following finding, to-wit:

'The Court finds six hundred thirty seven and 80/100 Dollars (\$637.80) due from defendants Maribel Connolly and Herman L. Winkelman at date of judgment by confession.'"

On November 28th, 1932, defendant moved the court to vacate and expunge the order entered November 2nd, 1932, and for leave to file an additional affidavit of merits, at which time the order appealed from denying defendant's motion was entered.

Objections are made by defendant to various proceedings had before various judges of the Municipal Court, but there is no showing in the record which suggests that defendant was not accorded a full and fair hearing by the judge who entered the order from which this appeal is taken. His principal contention seems to be that inasmuch as he was 28 years of age at the time he signed the lease, he was, as a matter of course, sui juris, or, as this word is



and for no other purpose; that Lindeberg is obliged to use speeded  
or eye glasses when reading, and that he did not have the use thereof  
at the time of the execution of the lease; that defendant, stated

to plaintiff at that time the need of glasses, and that plaintiff  
then stated to Lindeberg that it was unnecessary and hurriedly agreed

Lindeberg to sign the lease; that Lindeberg did not know of the  
provisions thereof, nor of the property in which he signed the same.

After the judgment was entered on June 19th,

1932, filed what is purported to be an amended statement of claim,  
in which he sets up many other things alleged facts con-

cerning the issues of the property located in the lease, and

which the judgment was entered, as an alleged set-off against

plaintiff's claim. On November 2nd, 1932, on motion of plaintiff,

this alleged set-off was withdrawn, and the court then and there

entered the following order:

"The court in this case, the defendant  
being present and not represented and therefore this court  
cannot do in proper course for trial before the court, without  
a jury, and the court being aware of the witness, and the  
evidence of plaintiff, and being fully advised in the premises  
about the following facts, to-wit:

"The court finds the plaintiff thirty seven and 30/100  
dollars (\$37.30) and five dollars and twenty cents (\$42.30)  
and interest thereon from the date of judgment to date of payment."

On November 28th, 1932, defendant moved the court to

vacate and set aside the order entered November 2nd, 1932, and for

leave to file an amended affidavit of assets, to which this case

might be referred for hearing defendant's motion was granted.

Objections were made by defendant to various proceedings

and before various judges of the municipal court, but they in no

manner in the record which suggests that defendant was not satisfied

with the trial before the judge who entered the order from which

he sought to be relieved. His financial condition seems to be that in-

to him he is now 33 years of age at the time he signed the lease,

defined, "incapacitated by lapse of years." The writer takes the flat position that this is not necessarily true as to one reaching such an age as that of defendant. Also, counsel urges as ground for reversal that defendant could not read without glasses, and that there was a misstatement made as to the contents of the instrument which he signed.

In Sheeler & Wilson Mfg. Co. v. Lane, 3 Ill. App. 433, this court said:

"When a person is not illiterate, blind or unacquainted with our language, it will not do to subvert the validity of a written instrument to a jury upon such hypotheses as those in the instruction under consideration. Even an illiterate person will be bound if he executes without requiring the instrument to be read. Thoroughgood's case, 2 Coke, 9. Where one can read but does not, then to void the instrument he must show some artifice or trick by which he was prevented, or in other words, the jury must be satisfied that the signature was obtained by fraud without negligence on the part of the signer."

See also Dickinson v. Dickinson, 305 Ill. 531.

The record does not show that any artifice or trick was used by anyone in procuring defendant's signature to the lease in question. The extent of his error made in his petition to set aside the judgment in this regard is that he was induced to sign a writing which he did not read, and this is no defense. The judgment is affirmed.

AFFIRMED.

WILSON AND HEGEL, JJ. CONCUR.

that defendant could not read without glasses, and that there was a misstatement made as to the contents of the instrument which he signed.

Page 1

Volume 57, Number 4, 1999

When a person is not allowed to enter a country, it will not be until the validity of a written instrument is a fact of record.

THE CHIEF OF POLICE, NEW YORK

The second does not show that any activities of this kind were being carried out by anyone in connection with the case in question. The nature of the case was in this position as to the evidence and the judgment is that it was not necessary to make any further inquiry into this matter.

• **Abstracts**

without any kind of notice.



36847

PAULINA RUSILOVICH,

(Complainant) Appellee,

v.

HARRY RUSILOVICH,

(Defendant) Appellant.

VERNAL SPRING

SUPERIOR COURT

274 I.A. 657  
COOK COUNTY.

Opinions filed March 14, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Superior Court of Cook County dissolving the marriage of complainant and defendant. The record shows that after the desertion alleged in the bill, the complainant upon receiving shot to her was sufficient evidence of the fact that the defendant had died, had married another. It appears that she was mistaken in this regard. The decree from which this appeal is taken, in addition to dissolving the marriage with defendant, finds and decrees that the marriage to her second and last husband now deceased, was legal and valid. The bill charged desertion, which defendant by his answer, denies.

There are many matters set forth both in the bill and answer, which are irrelevant to the issue in the case, which is, whether or not the complainant is entitled to a decree of divorce on the ground of defendant's desertion.

Complainant testified that she married defendant in Russia in 1899, and that he threw her out in May, 1903, after which she came to America, but went back to Russia in 1907 and tried to live with him again, but that he would not have her. She testified that she then came to Chicago, heard the complainant had been killed in the world war and married another. She produced two witnesses, one of whom testified that in Russia in 1903, 4 or 5 or 7, she had heard the complainant say, "I don't want to live with that wife." The

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Opinions filed March 14, 1934

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other stated that in Russia in 1908 she heard defendant say to complainant, "Get out, I don't want you."

In view of the fact that the court was without jurisdiction or power in this proceeding to enter a decree to the effect that complainant's second marriage was legal, and of the fact that the evidence offered to sustain the charge of desertion is unsatisfactory, the cause is reversed and remanded for a new trial.

REVERSED AND REMANDED.

WILSON AND REBEL, JJ. CONCUR.



other groups that in 1953 the House of Representatives

committee, "let me, I don't want you."

In view of the fact that the House was without jurisdiction

division of power in this instance to reject a measure in the House

and the committee's second report was issued on the 10th

and the witness stated he would be present at the hearing on the

committee, the House is expected to be present on the 10th

REPORT OF THE COMMITTEE

REPORT OF THE COMMITTEE

35865

E. A. BUNKER,

Defendant in Error,

v.

A. W. RANCK and H. F. RANCK, co-  
partners doing business as  
Prudential Realty Company,

Plaintiffs in Error.

MUNICIPAL COURT OF

CHICAGO.

274 I.A. 657<sup>5</sup>

Opinion filed March 14, 1934

MR. JUSTICE HENRY DELIVERED THE OPINION OF THE COURT.

This cause is in this court upon a writ of error directed to the Municipal Court of Cook County, to review the record in a proceeding wherein a judgment was entered by the court, without a jury, in favor of the plaintiff in the sum of \$2,804, in an action for breach of contract.

Plaintiff's statement of claim alleges that in the year 1928, he owned a lot in Evanston, Illinois, which was sold by the defendants for the sum of \$2,804, and that the transaction was completed and the money received by the defendants on October 15, 1928; that thereafter the defendants invested said sum in bonds or securities, and in 1929, the plaintiff received from the defendants \$100 accrued interest, and that the plaintiff demanded from the defendants plaintiff's securities or their cash value, which was refused.

The defense set forth by the defendants in their affidavit of merits is a denial that the plaintiff's lot was sold by the defendants or defendants' agent, or that the sale was completed on October 15, 1928, and the further denial that the defendants had anything to do with the sale of plaintiff's lot in Evanston, or the investment of the sum of \$2,804.

There is evidence in the record that the plaintiff was employed by the General Electric Company for a period of twenty-two years, and that his work at the time of the transaction in question was that of an armature winder for this company; that in 1927, the

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274 I.A. 657

Opinion filed March 14, 1934

This case is in this court upon a writ of error directed to the Municipal Court of Cook County, to review the record in a proceeding wherein a judgment was entered by the court, without a jury, in favor of the plaintiff in the sum of \$2,304, in an action for breach of contract.

The plaintiff's statement of claim alleges that in the year 1928, he owned a lot in Evanston, Illinois, which was sold by the defendant for the sum of \$2,304, and that the transaction was completed and the money received by the defendant on October 18, 1928; that thereafter the defendant invested said sum in bonds or securities, and in 1929, the plaintiff received from the defendant \$1500, and that the plaintiff demanded from the defendant the balance of the money, which was refused.

The defense set forth by the defendant in their reply to the writ of error is a denial that the plaintiff's lot was sold by the defendant or defendant's agent, or that the sale was completed on October 18, 1928, and the defense further states that the defendant has nothing to do with the sale of plaintiff's lot in Evanston, or the investment of the sum of \$2,304.

There is evidence in the record that the plaintiff was advised by the counsel for the defendant to delay the trial of this case until the time of the prosecution in another case, and that he was advised to do this because in 1927, the



plaintiff purchased a lot located in Evanston, Illinois, payable in installments; that in May, 1927, the plaintiff received a telegram from the defendants doing business as the Prudential Realty Company stating that they had a purchaser for the lot in Evanston at \$35. per foot, to which the plaintiff replied that he was willing to dispose of the lot at \$25 a foot; that plaintiff also received a telegram from the Prudential Realty Company in May or June, 1927, to the effect that one Littlefield would arrive to close the deal; that Littlefield did arrive at Wyandotte, Michigan, in May or June, 1927, and the plaintiff signed a contract for the sale of the lot and gave it to Littlefield.

It also appears that the plaintiff called at the office of the defendants and turned over papers regarding this lot to Littlefield in the year 1927, and the defendants, by their agent, receipted for the papers; that the deal, by the agents of the plaintiff, was closed and the consideration for the transfer of his interest was received by the defendants through one of its employees.

There is no dispute that Littlefield was acting as defendants' agent in the sale of the plaintiff's interest in the Evanston lot, and the defendants by their brief admit that the transaction was with Littlefield, and that he occupied a branch office of the defendants at Howard Avenue and Western Avenue, in the City of Chicago, while the main office of the defendants was located at Devon and Western Avenue, in Chicago. This admission indicates that at the time of the transaction Littlefield was not only the agent of the defendants, but continued as their agent until the plaintiff complained about the acts of the defendants, and their failure in not accounting for the money in their possession, and that thereupon, in June, 1930, the defendants dismissed Littlefield as an employee. The defendants acted as the plaintiff's agent in the transaction, and Littlefield together with the defendants received the commission for

plaintiff purchased a lot located in Evanston, Illinois, located in  
installments; that in May, 1937, the plaintiff received a telegram  
from the defendants being business as the plaintiff really learned  
specifying that they had a purchaser for the lot in Evanston of 1937.  
that when the plaintiff realized that he was willing to  
dispose of the lot at \$25 a foot; that plaintiff also received a  
telegram from the defendant really business in May or June, 1937,  
to the effect that one Littlefield would arrive to close the deal;  
that Littlefield did arrive at Evanston, Michigan, in May or June,  
1937, and the plaintiff signed a contract for the sale of the lot  
and gave it to Littlefield.  
It also appears that the plaintiff called at the office  
of the defendants and turned over papers regarding this lot to  
Littlefield in the year 1937, and the defendants, by their agent,  
received for the papers; that the deal, by the agents of the plain-  
tiff, was closed and the consideration for the transfer of his  
business was received by the defendants through one of its employees.  
That as no further fact Littlefield was acting as  
defendants' agent in the sale of the plaintiff's interest in the  
Evanston lot, and the defendants by their agent admit that the trans-  
action was with Littlefield, and that he occupied a branch office of  
the defendants at Second Avenue and Second Avenue, in the City of  
Chicago, while the main office of the defendants was located at  
Navy and Second Avenue, in Chicago. This admission indicates that  
at the time of the transaction Littlefield was not only the agent of  
the defendants, but continued as their agent until the plaintiff  
complained about the sale of the defendants, and their failure in  
not accounting for the money in their possession, and that defendant  
in June, 1937, the defendant dismissed Littlefield as an employee.  
The defendant acted as the plaintiff's agent in the transaction, and  
Littlefield received with the defendant received the consideration for

services rendered in the sale of the Aronson lot. The money that was received by the defendants for the sale and transfer of the lot by the plaintiff remained in the hands of the defendants, and Littlefield continued in the office of the defendants, used the defendants' stationery, and from all appearances the plaintiff had the right to assume that Littlefield was still acting for the defendants, which inference was justified from the fact that the defendants discharged Littlefield in June, 1930, after complaint was made by the plaintiff of the dishonesty of Littlefield. The rule of agency is well stated by the Supreme Court in the case of Stack Yrd Co. v. Mallory, Son & Zimmerman Co., 157 Ill. 554, as follows:

"One who holds out another as his agent to act for him in a given capacity, and, by his habits and course of dealing, justifies the inference that such other is authorized to act as his agent, whether it be in a single transaction or in a series of transactions, will not be heard to deny the agency to the prejudice of an innocent party, who has been led to rely upon the appearance of authority in the agent. (See also on Agency, secn. 83,84)."

The further rule that the principal is bound by the acts of its agent, unless it appears to the contrary, is approved in the case of American Hosiery Co. v. Bank of Montreal, 134 Ill. 333, in these words:

"A company is bound by the acts of its agent in the exercise of powers within the apparent scope of his authority, unless special limitations upon his powers are brought to the notice of the parties dealing with him. (Phoenix Ins. Co. v. Stocks, 149 Ill. 313; Phoenix Ins. Co. v. Hart, 148 Ill. 313; Noble v. Nugent, 89 Ill. 533 and 8 Corpus Juris, 776.)"

In the instant case the plaintiff's transactions with Littlefield, who appeared and acted for the defendants as their representative, were approved and ratified, and the defendants are at this time estopped from denying the agency and the authority of Littlefield. He, Littlefield, appeared as the agent of the defendants in their office until June, 1930. The defendants were chargeable with the receipt of the consideration due the plaintiff, and as the plaintiff's agent it was their duty to see that the consideration due the plaintiff was properly accounted for. However, as the



... was received by the defendant for the sale and surrender of the ...  
... by the plaintiff ... in the hands of the defendant, and ...  
... plaintiff ... in the office of the defendant, and the ...  
... defendant, plaintiff, and from all persons whom the plaintiff had ...  
... the right to assume that plaintiff was still acting for the defend- ...  
... which defendant was justified from the fact that the defendant ...  
... discharged plaintiff in June, 1935, after complaint was made by ...  
... the plaintiff of the dishonesty of plaintiff. The role of agency ...  
... is well stated by the Supreme Court in the case of Woods v. ...

Woods v. ..., 127 Ill. 2d, as follows:

"... one takes out another as his agent to act for him in ...  
... a given territory, and by his habits and course of dealing ...  
... defendant the defendant then made plaintiff to act ...  
... as his agent, plaintiff is to be a valid representative as in a ...  
... matter of representation, will not be bound on that basis ...  
... as the plaintiff of an innocent party, who has been led to ...  
... with whom the defendant is connected in the agent. (Woods ...  
... 127 Ill. 2d, 214.)"

The further rule that the principal is bound by the acts of its agent, ...  
... unless it appears to the contrary, is repeated in the case of ...  
American ... v. ..., 127 Ill. 2d, in these words:

"A company is bound by the acts of its agent in the exercise ...  
... of powers within the apparent scope of his authority, unless ...  
... special limitations upon his power are shown to the mind ...  
... of the person dealing with him. (Woods v. ... 127 Ill. 2d, 214.) ...  
... 127 Ill. 2d, 214; Woods v. ... 127 Ill. 2d, 214; ...  
... Woods v. ... 127 Ill. 2d, 214; ..."

In the instant case the plaintiff's transactions with ...  
... 127 Ill. 2d, 214, the agreement and acted for the defendant as their ...  
... representative, were approved and ratified, and the defendant and ...  
... this time refused from denying the agency and the authority of ...  
... 127 Ill. 2d, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

defendants permitted Littlefield to continue as their agent and employee, with apparent authority to act for the defendants, and the plaintiff, with knowledge of his authority to act for the defendants, to deal with Littlefield in the defendant's offices, they cannot be heard to deny the agency to the prejudice of the plaintiff, who was an innocent party acting in good faith and led by the appearance and the acts of Littlefield.

The defendants contend that because of a fatal variance between the pleadings and the proof of facts which disclose a claim against which the statute of limitations is a good defense and which is a different cause of action from that set forth in the pleadings, the plaintiff cannot maintain his action. The defendants point to the date of 1928 as the date of sale, and the date of October 15, 1928, as the date when the deal was closed and the money received by the defendants' agent. This court is of the opinion that the agency of Littlefield for the defendants was a continuous one, and the plaintiff dealt with him without knowledge that Littlefield was acting for himself in the transaction, and we believe that this action before us is well within the statutory period. The action was instituted on September 7, 1933, and there is evidence that the deal in question was closed on August 31, 1927, and that the acts of the defendants by their agent continued in September and October, 1928.

The evidence established that the amount due the plaintiff was \$7,804, and for the reasons stated herein, it is the conclusion of this court that Littlefield in the transaction with the plaintiff acted for and on behalf of the defendants, and that the court did not err in its finding for the plaintiff. The judgment entered thereon is accordingly affirmed.

JUDGMENT AFFIRMED.

and known to members of his family as being a person of  
 influence, with whom he was in contact, and  
 the plaintiff, with knowledge of his position as one of the  
 cause, to deal with him in the defendant's office, they  
 cannot be held to have been guilty of the violation of the plaintiff's  
 duty to the defendant, and the plaintiff is not entitled to the  
 relief sought.

[illegible]

*Journal of Management Education* 30(6)p. 718-739



38694

MARY A. LACEY,

Appellee,

v.

MARGARET JANISCH, CITY OF CHICAGO,  
a Municipal Corporation, et al.,

Appellants.

APPEAL FROM

CHICAGO COUNTY

CHICAGO COUNTY.

274 I.A. 658<sup>1</sup>

Opinion filed March 14, 1934

MR. JUSTICE HOBBS DELIVERED THE OPINION OF THE COURT.

This is an action by the plaintiff against the defendants to recover damages for personal injuries, and is before this court on appeal. The case was tried before the court, with a jury, and resulted in a verdict for the plaintiff and against the defendants Margaret Janisch, Peoples Gas Light & Coke Co., a corporation, and the City of Chicago, in the sum of \$10,000. The defendant Cordle Brothers Co., a corporation, was found not guilty. Subsequently the defendant Peoples Gas Light & Coke Co. was dismissed by the court.

After motions of the defendants Margaret Janisch and the City of Chicago for a new trial and in arrest of judgment were overruled, judgment was entered on the verdict, from which judgment the City of Chicago prosecutes this appeal.

The defendant, Margaret Janisch did not file a brief in this court, and the only brief before us is that of the defendant the City of Chicago.

The plaintiff, on September 12, 1933, filed an alternative motion to dismiss the appeal, or affirm the judgment for failure on the part of the defendant, the City of Chicago, to attach to or make a part of the record an assignment of errors. This motion was reserved to a hearing, and will be discussed later in the opinion.

The facts are that the plaintiff and the defendant, Margaret Janisch, are sisters. The plaintiff resided with this sister at 1821 Rescher Avenue, near the intersection of Rescher Avenue and

WILLIAM J. BAKER, Plaintiff,  
vs.  
JOHN J. BAKER, Defendant.

WILLIAM J. BAKER.

274 I.A. 638

Opinion filed March 14, 1934

THE COURT hereby orders that the defendant

shall pay to the plaintiff the sum of \$100.00, and in default thereof shall be liable to the plaintiff for the same, with interest thereon at the rate of six per cent per annum, from the date of the entry of this judgment until the same is paid.

The plaintiff, William J. Baker, is a resident of the City of Chicago, Illinois, and the defendant, John J. Baker, is a resident of the City of Chicago, Illinois. The plaintiff alleges that the defendant has wrongfully and unlawfully taken possession of certain real estate situated in the City of Chicago, Illinois, and that the plaintiff is entitled to the possession of the same.

After notice of the defendant's answer to the complaint was served on the plaintiff, the plaintiff moved for summary judgment, and the court granted the motion. The court found that the plaintiff was entitled to the possession of the real estate, and it entered judgment in favor of the plaintiff.

The defendant, John J. Baker, has not filed a writ of habeas corpus, and the only writ before us is that of the defendant. The City of Chicago.

The plaintiff, on September 13, 1933, filed an alternative motion to dismiss the appeal, or alternatively to affirm the judgment for reasons on the part of the record on assignment of error. This motion was referred to a hearing, and will be discussed later in the opinion.

The facts are that the plaintiff and the defendant, William J. Baker, are brothers. The plaintiff resided with his sister at 1211 South Dearborn Street, until the expiration of his lease there on

Paulina Street. The plaintiff was employed as a night telephone operator by the Illinois Bell Telephone Company, and on May 28, 1930, about 2 P. M., the plaintiff, together with the defendant Margaret Janisch and the latter's daughter, Mariel Keegan eighteen years of age, was in the defendant's automobile being driven by the defendant, and in the front seat, seated with this defendant was the defendant's daughter, and the plaintiff was seated in the rear seat at the time of the accident, which occurred at the intersection of the streets. At this intersection an excavation was made in Paulina Street, across Leacher Avenue, about five feet wide, in which gas mains were installed and after these mains were laid the trench was filled with dirt which had been removed at the time the excavation was made.

The controverted question of fact is whether the excavation was properly filled with the dirt that had been removed from this trench so as to make the intersection used by the plaintiff safe for travel. There is evidence that the filling of the trench raised the street at the point where the accident occurred so as to create a hump of from 3 to 12 inches above the street level; that the automobile in which the plaintiff was riding struck the hump, and from the shock the plaintiff was thrown to the floor.

It appears from the evidence that the trench was refilled on May 4, 1930, and that a tractor was rolled upon and over the fill; that the fill was higher than the surface of the street level, and that the hump mentioned by the witnesses was in this condition on the day of the accident, May 28, 1930.

The evidence is controverted not alone as to the condition of the street intersection, but also as to knowledge of the condition of the street both by the plaintiff and the defendant, City of Chicago.

There is no complaint by the defendant as to the amount of the verdict upon which the judgment was entered. There are but two questions called to the attention of the court. The first is that the



... The plaintiff was employed as a night watchman  
operator by the Illinois Bell Telephone Company, and on May 26, 1930,  
about 8:30 p. m., the plaintiff, together with the defendant, went  
to the defendant's home, located at 1818 North Dearborn Street, in  
Chicago, and the plaintiff was asked to go to the rear yard of the  
house, which was the location of the investigation of the accident.  
At this investigation an excavation was made in the back yard, between  
the house and the street, in which the body of the plaintiff was  
found. After these things were said the trench was filled with dirt which  
had been removed from the trench, and the excavation was closed.  
The controversy centered around the question of whether the excavat-  
ion was properly filled with dirt and back soon removed from  
this trench so as to make the investigation made by the plaintiff safe  
for travel. There is evidence that the filling of the trench caused  
the street at the point where the accident occurred to be so crooked  
a bump of from 8 to 12 inches above the street level; that the auto-  
mobile in which the plaintiff was riding struck the bump, and from the  
shock the plaintiff was thrown to the street.  
It came to pass that the evidence that the trench was refilled  
on May 4, 1930, and that a trench was filled upon and over the fill;  
that the fill was higher than the surface of the street level, and  
that the bump mentioned by the witnesses was in this condition on  
the day of the accident, May 26, 1930.  
The evidence is controverted not alone as to the condition  
of the street, but also as to the location of the accident  
of the street both by the plaintiff and the defendant, City of Chicago.  
There is no dispute by the defendant as to the amount of  
the money upon which the judgment was entered. There are but two  
questions called to the attention of the court. The first is that the

trial court erred in refusing to direct a verdict for the defendant, the City of Chicago. The City contends that there is no evidence in the record from which it can reasonably be inferred that the defendant, the City of Chicago, committed an act of negligence which was the proximate or controlling cause of the injury sustained by the plaintiff.

The City points to the evidence of witnesses that the back-fill of the trench was done in the usual and customary practice used in work of that character. There is no dispute that the trench was filled, causing a hump of from 3 to 12 inches, and the plaintiff's case is not predicated upon the usual and customary way in which the trench was filled, but upon the fact that the hump was the result of the negligent filling, and remained for a time sufficient for the City to have notice of the condition of the street intersection in question.

The defendant, the City of Chicago, is not an insurer of the safety of persons using the street, but nevertheless it is bound to use reasonable care to keep its streets in a reasonably safe condition for ordinary travel thereon of persons who are in the exercise of due care and caution for their own safety, and it is liable if the obstructions or defects in the street or sidewalk are of such a nature that a person exercising ordinary care cannot avoid danger or injury in passing over them, especially where the defects cannot readily be avoided or detected, Boender v. City of Harvey, 211 Ill. 128.

The City has authority to permit the construction of gas mains in the streets and to permit improvements, but the City is liable in permitting such construction as would leave the street unsafe or dangerous for persons or vehicles to pass upon. City of Chicago v. Brady, 79 Ill. 377.

In the instant case it was for the jury to decide whether the hump at the intersection of the streets was sufficient in height to cause injury, and whether the plaintiff exercised due care and cau-





tion for her own safety in the use of the highway.

Finally, is the verdict and judgment against the defendants contrary to the manifest weight of the evidence? The City contends that the plaintiff's evidence failed to sustain the burden of proof on the question of care for her own safety, and that the evidence shows that she was guilty of contributory negligence.

The defendants point to the evidence to establish that the plaintiff knew that the work was being done at the intersection in question, and had knowledge of it a month prior to the accident. Assuming that the plaintiff knew that the work was going on, this surely would not justify the inference, when traffic was permitted by the City to use the intersection in question, that the street was not reasonably safe for use by the public. The fact that the plaintiff signed a statement from which it appears that she knew the condition of the street, and which was admitted in evidence, together with all the other facts and circumstances in the record, was before the jury.

Stress is laid by the City upon the fact that there is evidence in the record to the effect that the plaintiff while riding in the automobile of her sister was talking with her niece, who was in the front seat, and that she turned in her seat so as to carry on the conversation; that the plaintiff <sup>by</sup> lack of attention to the speed of the car and the surrounding conditions, was guilty of contributory negligence. The court has indicated in its opinion that it was for the jury to pass upon the question of contributory negligence of the plaintiff, as well as the negligence of the City. City of Landriagh v. Selan, 141 Ill. 430. Armand v. City of Chicago, 170 Ill. App. 352, Barry v. City of Evanston, 136 Ill. App. 81.

In discussing the alternative action filed by the plaintiff on September 13, 1931, to dismiss the appeal or to affirm the judgment for the reason that the City of Chicago, a co-defendant, failed to file an assignment of errors, this court finds from the record that



the City of Chicago as a defendant was granted leave on April 28, 1933, to join in the assignment of errors filed by the defendant Margaret Janisch, which was agreed to by her. This assignment of errors by the defendant Margaret Janisch was signed by the Corporation Counsel and the City Attorney of the City of Chicago, and by other parties to the suit, and there appears attached to the record the City's joinder in the assignment of errors on behalf of the co-defendant, Margaret Janisch.

On September 20, 1933, the City of Chicago asked for leave to join quod Pro tunc as of April 28, 1933, in the assignment of errors filed and appearing in the record in this proceeding. This motion is still pending.

The record contains not only the assignment of errors by Margaret Janisch, one of the defendants, but also the joinder of the City of Chicago in the assignment of errors filed. The proper practice in this case, if the City improperly joined in the assignment of errors, was for the plaintiff, by motion, to call the attention of this court to the improper procedure, to which this court would give due consideration, but as it is, the issues are joined upon the errors assigned.

The motions pending will not be allowed, and for the reasons stated, the court has considered the merits of the appeal.

Finding no error in the record which would justify a reversal of the judgment, it is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND WILSON, J. CONCUR.



The City of Chicago on a defendant was granted leave on April 25, 1913, to join in the assignment of errors filed by the defendant. Defendant's motion was granted on April 25, 1913. The assignment of errors by the defendant was signed by the defendant's attorney and the City of Chicago. The assignment of errors was filed in the court on April 25, 1913. The court has considered the assignment of errors and the City of Chicago's motion to join in the assignment of errors on behalf of the defendant. The court has granted the City of Chicago's motion.

On December 17, 1913, the City of Chicago asked for leave to join in the assignment of errors filed by the defendant on April 25, 1913. The court has granted the City of Chicago's motion to join in the assignment of errors. The court has considered the assignment of errors and the City of Chicago's motion to join in the assignment of errors on behalf of the defendant. The court has granted the City of Chicago's motion.

The court has considered the assignment of errors by the City of Chicago and the defendant. The court has granted the City of Chicago's motion to join in the assignment of errors. The court has considered the assignment of errors and the City of Chicago's motion to join in the assignment of errors on behalf of the defendant. The court has granted the City of Chicago's motion. The court has considered the assignment of errors and the City of Chicago's motion to join in the assignment of errors on behalf of the defendant. The court has granted the City of Chicago's motion.

The motion pending will not be allowed, and for the reasons set out, the court has considered the merits of the appeal. The court has granted the City of Chicago's motion to join in the assignment of errors. The court has considered the assignment of errors and the City of Chicago's motion to join in the assignment of errors on behalf of the defendant. The court has granted the City of Chicago's motion.

THE COURT HAS CONSIDERED THE ASSIGNMENT OF ERRORS AND THE CITY OF CHICAGO'S MOTION TO JOIN IN THE ASSIGNMENT OF ERRORS ON BEHALF OF THE DEFENDANT. THE COURT HAS GRANTED THE CITY OF CHICAGO'S MOTION.

38711

DANIEL O'CONNOR,

Appellee,

v.

MARTIN AUTO PARTS COMPANY,  
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

274 I.A. 638<sup>2</sup>

Opinion filed March 14, 1934

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of \$236.85 in favor of the plaintiff entered in the Municipal Court of Chicago in an action by the plaintiff against the defendant for damages to plaintiff's automobile. The case was tried by the court, without a jury.

The plaintiff in his statement of claim alleged, in substance, that he was the owner of an automobile, which he was driving north on Ashland Avenue, in the City of Chicago; that the defendant was the owner of an automobile parked, without lights, on Ashland Avenue in the vicinity of Wexson, which was in violation of the parking ordinances of the City of Chicago, and that as a result of the negligence of the defendant the plaintiff's car was caused to run into and against the automobile of the defendant, thereby damaging plaintiff's car.

The defendant in its affidavit of merits denies ownership, possession or control of the automobile claimed to be parked on Ashland Avenue; denies the parking of said automobile, and denies negligence.

It appears from the evidence that on February 10, 1931, plaintiff was driving his automobile north on Ashland Avenue, approaching Wexson Street; that the time of the accident was about 8 o'clock P.M.; it was dark, and as the plaintiff approached 3832 North Ashland Avenue near the northwest corner he passed a number of cars parked at an angle with the curb, and his car collided with a red which pro-

ST 41 A 638

Opinion filed March 14, 1934

MR. JUSTICE BREWER delivered the opinion of the court.

This is an appeal by the defendant from a judgment in the sum of \$100.00 in favor of the plaintiff entered in the Municipal Court of Chicago on a motion by the plaintiff against the defendant for damages to plaintiff's automobile. The case was tried by the court without a jury.

The plaintiff in his statement of claim alleged, in substance, that he was the owner of an automobile, which he was driving north on Ashland Avenue, in the City of Chicago; that the defendant was the owner of an automobile parked, without lights, on Ashland Avenue in the vicinity of Grand, which was in violation of the provisions of the City of Chicago, and that as a result of the negligence of the defendant the plaintiff's car was struck by the defendant's car, thereby causing plaintiff's automobile to be damaged.

The defendant in his statement of denial denied ownership or control of the automobile claimed to be owned on Ashland Avenue; denied the striking of said automobile; and denied negligence.

It appears from the evidence that on November 22, 1931, plaintiff was driving his automobile north on Ashland Avenue, approaching Grand Street, and the line of the defendant was about 100 feet west of the line, and in the plaintiff's statement that he was driving west on Grand Street at that time, and the defendant's statement that he was driving east on Grand Street at that time, and the two automobiles collided with a head-on impact.



jected from a log used to jack up the wrecked Lincoln car, and by reason of said collision, plaintiff's car was damaged; that the defendant's place of business was located at that number on Ashland Avenue, and he was engaged in a general automobile wrecking business.

It appears from the evidence that during the progress of the trial, the court entered an order asking an auto concern doing business under the name of "Redi Towing Service, Inc." an additional party defendant, which defendant filed its appearance and, at the close of the hearing, was dismissed as a party to the litigation.

The following question is before this court: Is there evidence sufficient to sustain the contention of the plaintiff that ownership of the car in question was in the defendant? Ownership, possession or control was made an issue by the defendant in its affidavit of merits. Upon this issue, the evidence relied upon by the plaintiff to establish ownership in the defendant was the fact that the automobile was parked in the street 25 or 30 feet south of defendant's place of business. The defendant, however, answered and denied that the wrecked Lincoln car was owned by it, or that it ever had possession or control of the automobile.

The evidence upon which the plaintiff bases his contention of sufficiency of evidence to establish ownership in the defendant is this:

- "Q. Those cars were there parked diagonally?
- A. Cars held by Martin Auto Parts Company."

This evidence of the plaintiff is the only direct evidence offered upon this question. The defendant denied having any knowledge of the parked car. The evidence of the plaintiff in the record is not sufficient to establish ownership in the defendant. The fact that a car is parked in front of a building or place of business does not in and of itself establish ownership in an occupant of the building.

located from a log used to block up the wrecked Lincoln car, and by

version of said witness, Plaintiff's car was damaged; that the

defendant's place of business was located at that number on Island  
avenue, and he was engaged in a general automobile wrecking business.

It appears from the evidence that during the progress of

the trial, the court entered an order setting aside the verdict being

business under the name of "Kodi Towing Service, Inc." an additional

party defendant, which defendant filed the appropriate and, as the

close of the hearing, was dismissed as a party to the litigation.

The following question is before this court: Is there

evidence sufficient to establish the ownership of the plaintiff's car

ownership of the car in question was in the defendant's ownership,

possession or control was some one known by the defendant in the will-

ing of the car. Upon this issue, the evidence relied upon by the

plaintiff is as follows: The defendant was the last person

the automobile was moved in the street 15 or 20 feet south of defendant's

place of business. The defendant, however, asserted and denied

that the wrecked Lincoln car was owned by it, or that it ever had

possession or control of the automobile.

The evidence upon which the plaintiff bases his contention

of ownership of evidence to establish ownership in the defendant

is this:

"That was what I saw when I looked at the Lincoln car  
and saw it was the same as the one I saw in the street."

This evidence of the plaintiff is the only direct evidence

offered upon this question. The defendant denied having any knowledge

of the parked car. The evidence of the plaintiff in the record is not

sufficient to establish ownership in the defendant. The fact that a

car is parked in front of a building or place of business does not in and

of itself establish ownership in an occupant of the building.

It appears from the record before this court that there is a failure of evidence by the plaintiff to establish ownership, possession or control of the wrecked car in the defendant, and for that reason it was error for the court to enter judgment for the plaintiff.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

HALL, F.J. AND WILSON, S. CONCUR.



It appears from the record before this court that there  
is a failure of evidence of the defendant's knowledge  
of the nature of the property at the time of the seizure, and the  
fact that it was not given the same as other property for the  
purpose of the seizure.

The judgment is reversed and the cause remanded.  
REVEREND THE JUSTICE.

WILLIAM H. HARRIS, J. JUDGE.

36730

ROBERT W. WOODWARD,

appellee,

v.

CHARLES K. RUSSELL,

Appellant.

Supreme Court

OF CHICAGO.

274 I.A. 658<sup>3</sup>

Opinion filed March 14, 1934

MR. JUSTICE WHEELER DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment entered for the plaintiff in the Municipal Court of Chicago for the sum of \$300. The case was submitted for trial, without a jury, on a promissory note signed by the defendant, dated February 13, 1928, in the principal sum of \$1,000, payable to the order of the plaintiff, on or before three years after date. Subsequently a part payment of \$100 was made by the defendant to the plaintiff. The pleadings are not questioned, and the defense is want of consideration by the defendant in the execution of the note.

The facts are substantially that the plaintiff was <sup>a</sup> client of the defendant, a practicing attorney in Chicago; that the plaintiff asked the defendant whether he knew where the plaintiff could invest \$1500, and the defendant advised him that one Al H. Balkind, who operated the Commercial Press, Inc., desired to make a loan of \$1500, and thereafter the loan was made by the plaintiff to Al Balkind; that the defendant prepared the papers; that the plaintiff received a note for \$1500 for the loan, signed by the Commercial Press, Inc., Al H. Balkind, Pres., dated January 3, 1928, due fifteen months after date, and payable to the order of the plaintiff, and in addition, a promissory note of the same date and amount signed by Al H. Balkind, personally, secured by collateral consisting of the stock of the Commercial Press, Inc. of the par value of \$400; that the plaintiff deposited the net amount of the loan, \$1500, with the defendant, who in turn paid to Al H. Balkind this amount; that the defendant did





not receive a fee from either party for the services rendered, and that there is evidence that the defendant verbally guaranteed the loan.

It also appears that upon maturity of the note, Belkind or the Commercial Press, Inc. did not pay the principal and interest due to the plaintiff, but that subsequently and prior to the execution of the note by the defendant, the defendant paid \$300 to the plaintiff on account of the Belkind loan.

The defendant contends that the alleged promise to guarantee the loan was not an original promise, but a collateral one, and was an undertaking to be responsible for the default or miscarriage of another, and cites in support of this contention the case of Illinois Surety Co. v. Guarro, 303 Ill. 570. This decision is not helpful in disposing of the question in this case. The supreme Court in its opinion on the question whether the guaranty therein involved was a collateral promise, held that to stand back of an agreement is to "stand back of any obligation" which the principal may incur in a certain matter and is a guaranty contract, not a collateral promise to be responsible for the debt of another. Other decisions are called to our attention along the same line. This action is based upon the promissory note in question and not upon a guaranty of the loan to Belkind. The appeal involves the question of consideration for the execution of the note.

Having reached this conclusion, we now pass on to the question of what, if any, consideration induced the execution of the note. From the facts, it is apparent that when the Belkind note was not paid, the plaintiff called upon the defendant to make good this default. The defendant upon demand of the plaintiff paid to him \$300 in different amounts to apply on account of the default in the payment of the Belkind note; that upon the insistent demands of the plaintiff, and threat of a suit, the defendant signed the note, which

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It also contains a copy of the report of the Committee on the Government of the District of Columbia, dated June 1, 1900, and a copy of the report of the Committee on the Government of the District of Columbia, dated June 1, 1900.

THE CHAIRMAN: I have the honor to acknowledge the receipt of your letter of the 10th inst. and in reply to inform you that the same has been forwarded to the proper authorities for their consideration. I am, Sir, very respectfully,  
Yours obedient servant,  
J. H. [Signature]

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is here in controversy. The rule is well established that a compromise of a disputed claim between parties is sufficient consideration to support a claim, or a note executed in settlement thereof. There was a dispute between the plaintiff and the defendant in this case in regard to the default in the payment of the walking note. It was insisted by the plaintiff that the defendant guaranteed the payment to the plaintiff. This fact was disputed by the defendant, and upon denial of liability by the defendant, after part payment was made by him, the plaintiff threatened suit. There is no dispute between the parties that the rule of law is that where there is a bona fide dispute, the fact of the dispute is sufficient consideration for a settlement. The case of Honeyman, et al. v. Jarvis, 79 Ill. 318, cited by the plaintiff, is somewhat analogous, and the decision has a material bearing on the case here on appeal. The court in that case said:

"It is not essential, to sustain the note, that it be absolutely certain appellants' testator was legally liable on the bond. The compromise of a doubtful right, though it afterwards turns out the right is on the other side, where there is neither actual nor constructive fraud, and the parties act in good faith, with full knowledge of the facts, is a sufficient consideration to support a promise. And it is, accordingly, said: 'The real consideration which each party receives under a compromise, being, not the sacrifice of the right, but the settlement of the dispute and the abandonment of the claim it is no objection to the validity of the transaction, that the right was really in one of the parties only, and that the other had no right whatever. The fact that the one may have had no claim, is immaterial, if he was honestly mistaken as to his claim.' 1 Chitty on Contracts. (11 Am. Ed.) note 'm.' and (1), p. 46. And this is the law as recognized by this court in McKinley v. Watkins, 13 Ill. 140, Cigaworth v. Coulter, 18 Id. 234, and Miller et al v. Hawker, 58 Id. 186.

Numerous English and American cases might be cited in support of the principle, but we shall conclude with a single quotation found in the remarks of Lord Hardwicke, in Stephenson v. Stephenson, 1 Atkyns, at p. 13. He said, following a previous decision of Lord Macaulayfield; 'An agreement entered into upon a supposition of a right, or of a doubtful right, though it afterwards comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties, for the right must always be on the one side or the other, and therefore the compromise of a doubtful right is a sufficient foundation of an agreement.'



is here in controversy. The trial will establish that a com-  
promise of a disputed claim between parties is not a bar to recovery.  
There was a dispute between the plaintiff and the defendant in this  
case in regard to the amount of the payment of the claim.  
It was insisted by the plaintiff that the defendant was liable for  
payment to the plaintiff. This fact was admitted by the defendant,  
and upon denial of liability by the defendant, after jury payment  
was made by him, the plaintiff introduced evidence. There is no dispute  
between the parties that the rule of law is that where there is a  
disputed claim, the fact of the dispute is sufficient consideration  
for a verdict. The case of Hawthorne et al. v. Hawley, 19  
Ill. 216, cited by the plaintiff, is not an authority, and the  
plaintiff has a remedy against the defendant in equity. The  
court in this case will

Editor: *Journal of the History of Biology*

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The forbearance of the plaintiff from suing the defendant for payment of the money loaned by him to Watkins was sufficient consideration to support the note executed by the defendant. The court so held in the case of Forster v. Insler, 103 Ill. 273, where it was said:

"Moreover, in Stapleton v. Stapleton, 1 Atkyns, 12, Lord Hardwicke says: 'In the case of Gann v. Gann, it was laid down by Lord Mansfield, that an agreement entered into upon a supposition of a right, or of a doubtful right, though it often comes out that the right was on the other side, shall be binding,' etc. And in McKinley v. Watkins, 17 Ill. 143, the court, in speaking of this class of actions said: 'It is immaterial whether the plaintiff could have recovered in such action or not. If he honestly supposed that he had a good cause of action, the compromise of such right was a sufficient consideration to uphold a contract fairly entered into between the parties, irrespective of the question as to who was in the right.' The word 'suppose,' in the instruction, is used in the same sense that 'supposition' and 'supposed' are used in these cases, and, we think, clearly with as much accuracy. We must hold this objection also untenable.

\* \* \* \* \*

There was, therefore, such a claim on behalf of appellee as to lay a reasonable ground for the appellant making the promise. Mulholland v. Bartlett, 74 Ill. 82; McKinley v. Watkins, supra. And the only question to be settled was, whether the appellee honestly supposed or believed (using these words as convertible) that he had a cause of action, and whether the promissory note was, in good faith, given and accepted as a compromise of that cause of action. McKinley v. Watkins, supra; Sigsworth v. Coulter, 18 Ill. 304; Honeyman v. Jarvis, 73 Id. 422."

The case before us was decided by the trial court upon a question of fact, which decision was based upon the note in question, and unless the finding of the court was against the manifest weight of the evidence this court on appeal will not reverse the finding. In finding for the plaintiff, the trial court did not err, for its finding is justified by the evidence that the note was executed by the defendant and supported by a sufficient consideration.

For the reasons expressed in this opinion the judgment is affirmed.

STANLEY C. HARRIS.

HALL, P.J. AND WILSON, J. CONCUR.





No. 38733

WILLIAM FELDMAN,

Defendant in Error,

v.

ALBERT PAUL WEISS,

Plaintiff in Error.

SUIT OF ERROR TO  
THE MUNICIPAL COURT  
OF CHICAGO.

274 I.A. 658<sup>4</sup>

Opinion filed March 14, 1934

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This cause is in this court upon a writ of error

to review the record wherein William Feldman is plaintiff and Albert Paul Weiss is the defendant. On June 1, 1931, the cause was called for trial in the Municipal Court of Chicago in the absence of the defendant. A jury was sworn and returned a verdict finding the issues for the plaintiff and assessing the damages at \$725, on which verdict judgment was entered by the court. The defendant sought to have the judgment which was entered on June 1, 1931, vacated, and filed a petition in support of the defendant's motion, which motion, on January 13, 1932, was overruled by the court.

It appears from the petition filed by the defendant that the plaintiff filed his suit on February 9, 1931; that on February 18, 1931, the defendant filed his appearance and affidavit of merits and the cause was placed on the jury calendar; that on May 12, 1931, the cause was set for trial by the Chief Justice of the Municipal Court of Chicago, in the court room known as 1118. On June 1, 1931, the cause was reached for trial, and the defendant having failed to appear, judgment was entered for the plaintiff.

It further appears that when the cause was reached for

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trial, neither the petitioner nor his attorney was notified of the order of May 13, 1931, by the Chief Justice of the Municipal Court, setting the case for trial on June 1, 1931, in Room 1118 of the City Hall of Chicago, and that the only notice the petitioner had that the case had been tried was by service, on July 8, 1931, of the execution by the bailiff of the Municipal Court; that the petitioner and his attorney were without negligence, and that the petitioner was prevented from presenting his meritorious defense to the plaintiff's claim.

The plaintiff in his statement of claim alleges that he performed legal services in the execution of a lease and other agreements between the defendant and his brother Richard H. Weiss, which were prepared during March, 1929, and that the plaintiff appeared for the defendant before the attorney General of the State of Illinois, in regard to Inheritance Taxes during June and July, 1929, and that the plaintiff rendered legal services in settlement of the matter of Schwanstelsk against the defendant on August 1, 1929, and that by reason of said services there was due the plaintiff from the defendant \$725.

As a defense to this action, the petitioner avers that the services alleged to have been rendered in the preparation of a lease and agreements between the petitioner and his brother Richard H. Weiss, were rendered in connection with the Probate Court proceedings in the matter of the Estate of Bertha A. Weiss, deceased, and that the services before the attorney General were likewise performed in connection with the probating of said estate; and the petitioner avers that after said estate was probated, the plaintiff requested a loan from the defendant of \$1,000 from the funds of the estate, and the petitioner, previous to the closing of the estate, requested the plaintiff to return this loan of



trial, neither the petitioner nor his attorney was notified of the order of May 18, 1931, by the Chief Justice of the Supreme Court, setting the case for trial on June 1, 1931, in Room 1112 of the City Hall of Chicago, and that the only notice the petitioner had that the case had been tried was by service, on July 6, 1931, of the execution by the Sheriff of the County of Cook; that the petitioner and his attorney were without notice, and that the petitioner was prevented from presenting his meritorious defense to the plaintiff's claim.

The plaintiff in his statement of claim alleges that he purchased legal services in the execution of a lease and other agreements between the plaintiff and his brother Richard A. Jones, which were executed under duress, in 1928, and that the plaintiff appeared for the defendant before the Attorney General of the State of Illinois, in regard to the execution of said lease and other agreements, and that the plaintiff rendered legal services in settlement of the matter of "Chancery" against the defendant on August 1, 1930, and that by reason of said services there was due the plaintiff from the defendant \$750.

As a defense to this action, the petitioner avers that the services alleged to have been rendered in the preparation of a lease and agreements between the petitioner and his brother Richard A. Jones, were rendered in connection with the estate of Henry Jones, and that the services before the Attorney General were likewise performed in connection with the probate of said estate; and the petitioner avers that said estate was probated, the plaintiff rendered a loan from the defendant of \$1,000 from the funds of the estate, and the petitioner, previous to the closing of the estate, requested the plaintiff to return this loan of

\$1,000, less such sum as might be due the plaintiff for services performed as attorney for the petitioner. The Probate Court permitted the plaintiff to retain the \$1,000 as compensation in full for his services as attorney in the matter of said estate; that the services rendered in settlement of the judgment in the case of Schwendelek against your petitioner consisted of the paying off of a smaller judgment in full by check.

It also appears from the petition that by reason of the congested condition of the jury calendar, a calendar was printed every second year; that the petitioner was informed that some of the pending cases on the jury calendar were called from time to time by the Chief Justice of the Municipal Court, and during one of such calls, the case was set for trial on June 1, 1931; that the petitioner inquired, through his attorney, of one of the clerks of the Municipal Court, prior to the entry of said judgment, and was informed that the next jury calendar would not be issued until the fall season of 1931. This motion of the defendant to vacate the judgment in question was made as provided for by Chap. 37, Sec. 21 of the Municipal Court Act. (Cahill's Ill. Rev. Stats. 1931.) The motion to vacate the judgment was not made until November 9, 1931, some months after the rendition of the judgment on June 1, 1931. Section 21 provides for the filing of a petition in the nature of a bill in equity from which it must appear that there were equitable grounds for the vacation of the judgment, otherwise that a motion to vacate the judgment must be made within thirty days from the date of the rendition of the judgment. In a discussion of the facts, it should appear that the defendant was diligent, and that no fraud, accident or mistake interfered with his being present at the trial of his case.

The point at issue is whether the defendant was misled

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by the statement of the clerk in the office of the Clerk of the Municipal Court that no further calendar of jury cases would be issued. The clerk testified to the fact that in March, 1931, upon inquiry, he stated to the defendant's attorney that there would be no jury calendar until the fall term. From the evidence of the witness it is not clear whether the clerk referred to the printing of calendars or the suspension of the call of jury cases.

When the defendant entered his appearance he also made a demand for a jury, and the case was then placed on the next jury calendar. The issuance of the jury calendar was announced in the Municipal Court Record, a newspaper of general circulation among the lawyers practicing in Chicago, and the calendars were distributed on May 1, 1931. The case in question was transferred from the calendar on June 1, 1931, and was tried before a jury in the absence of the defendant, and judgment was entered upon the verdict, as we have already stated in this opinion.

The affidavit of the attorney for the defendant was filed in support of defendant's motion, in which it is stated that affiant inquired of one George McFarlane, who was stationed in the office of the Chief Justice of the Municipal Court, and he, affiant was informed by the clerk that there would be no jury calendars issued until the following October. From the record, nothing was done by affiant as the attorney for the defendant until November 9, 1931. Affiant, in an additional affidavit stated that he had not talked with McFarlane, but did talk with one Paul Krahn, from whom he received information that no jury calendar would be issued until the following October.

Judge John J. Lupe, one of the judges of the Municipal Court of Chicago, heard defendant's motion, and he stated in open

the statement of the clerk in his office at the time of the hearing that no further evidence of any kind would be introduced. The clerk testified to the fact that in March, 1931, when finally, he acted as the defendant's attorney that there would be no further evidence until the fall term. From the evidence of the record it is not clear whether the clerk referred to the printing of evidence on the same occasion as the clerk at that time.

When the defendant entered his appearance in this case a hearing for a jury, and the case was then placed on the next jury calendar. The issuance of the jury calendar was announced in the Municipal Court Record, a newspaper of general circulation among the lawyers practicing in Chicago, and the defendant was designated as No. 1, 1931. The case in question was transferred from the calendar on June 1, 1931, and was listed before a jury in the absence of the defendant, and judgment was rendered upon the verdict, as we have already stated in this opinion.

The defendant at the hearing for the calendar was listed in absence of defendant's action in which it is stated that although inquired of one George H. H. H., and was stated that in the office of the chief justice of the Municipal Court, and for all that was informed by the clerk that there would be no further evidence introduced until the fall term. From the record, nothing was lost by delay in the hearing for the calendar until November 1, 1931. Hence, as an additional effort was made that he had not failed with H. H. H., and did not fail with one Paul H. H., from whom he received information that no further evidence would be introduced until the following calendar.

Later than 1. H. H., one of the judges of the Municipal Court of Chicago, heard defendant's motion, and he stated in open

court, after the judge and lawyers visited the Chief Justice, that he did not remember ever telling Krahn there would be no jury calendar until the following October, but on the contrary, the Chief Justice stated that there were jury calendars issued in March, May and June, 1931, and this was admitted as a fact by the Clerk, Paul C. Krahn.

The court heard the evidence and passed upon the motion to vacate the judgment, and unless the order entered is against the manifest weight of the evidence, this court would not be justified in reversing the judgment of the trial court.

From the record, it does not appear that there was diligence exercised by the attorney for the defendant, except that he relied upon the alleged statement of a clerk in the office of the Clerk of the Municipal Court. The evidence of the clerk is contradicted, from the fact that jury calendars were issued for the months indicated above, and jury cases were heard in the Municipal Court of Chicago during that time.

The order of the court is affirmed.

ORDER AFFIRMED.

HALL, F. J. AND WILSON, J. CONCUR.



about, after the judge had finished the trial, and  
that he did not remember ever seeing Kuchel there as he no  
jury witness until the following October, but on the contrary,  
the chief justice asked him there were jury witnesses issued  
in March, May and June, 1881, and this was admitted as a fact by  
the jury, Paul C. Kuchel.

The court heard the witness and passed upon the matter  
to reverse the judgment, and unless the order entered in regard  
the weight of the evidence, this court would not be  
justified in reversing the judgment of the trial court.

From the record, it does not appear that there was diligence  
exercised by the attorney for the defendant, except that he relied  
upon the alleged statements of a clerk in the office of the clerk  
of the judicial court. The evidence of the clerk is contro-  
verted, from the fact that jury witnesses were issued for the  
month indicated above, and jury oaths were taken in the trial  
court at Chicago during that time.

THE COURT OF THE STATE IS ADVISED.

WILLIAM W. WILSON,

WILLIAM W. WILSON, ATTORNEY AT LAW,

37423

EVA CONEN,

Complainant,

v.

JULIUS A. POLIKOFF, as Trustee, et al.,

Defendants.

On Appeal of THE FIDELITY AND CASUALTY  
COMPANY OF NEW YORK,

Appellant.

INTERLOCUTORY APPEAL.

COOK COUNTY COURT

COOK COUNTY.

274 I.A. 659<sup>1</sup>

Opinion filed March 14, 1934

MR. JUSTICE HERBEL DELIVERED THE OPINION OF THE COURT.

This action is in this court upon an interlocutory appeal from an order entered in the Superior Court of Cook County upon the petition of F. T. Dustin, a receiver heretofore appointed in the above cause, in which petition he prayed that a restraining order be entered restraining The Fidelity and Casualty Company of New York from prosecuting in the Municipal Court of Chicago its then pending suit against the receiver.

The facts are substantially that on December 31, 1931, the complainant filed against the defendants her bill to foreclose a second mortgage upon certain premises therein described. The court appointed F. T. Dustin as receiver of the premises, and he filed a receiver's bond in the sum of \$10,000 with The Fidelity and Casualty Company of New York, as surety. This bond was approved by the court. The receivership was subsequently extended to include a suit by the Chicago Title & Trust Company, as trustee, v. Byron F. Willens, et al. involving the foreclosure of the first mortgage upon the same premises. The condition of the bond is as follows:

"Now, Therefore, If the said F. T. Dustin shall duly account for what shall come to his hands or control as such receiver, and pay and apply the same from time to time as he may be directed by said Court, and obey such orders as said Court may make in relations to said trust, and in all respects faithfully discharge the duties of said trust, then the above obligation to be void, otherwise to remain in full force and virtue."

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Opinion filed March 14, 1934

[illegible]



At the time of the application for the bond, the receiver signed an application dated January 6, 1933, which contained a provision to save The Fidelity and Casualty Company of New York harmless and indemnify it for any and all damage, loss or expense for which it may become liable. On or about March 29, 1933, Dustin, as receiver, filed his Report and account with the court, accounting for the receipt and expenditure of moneys in his hands amounting to \$3,839.02. Thereafter, the court entered an order on September 6, 1932, that the sum in Dustin's hands, as receiver, be paid in reduction of the indebtedness due the complainant under the terms of the decree entered in the cause.

On September 12, 1932, Dustin filed with the court a petition stating that he, the receiver, was unable to comply with the order of September 6, 1932, because prior to the date of the entry of this order he had deposited the receivership funds with the Citizens State Bank of Chicago, which bank was closed on May 26, 1932, by the Auditor of Public Accounts of the State of Illinois, and offered to assign to Eva Cohen his claim against the bank for the sum of \$3,438.04, and prayed for a modification of the order of September 6, 1932. This motion is still pending and is not disposed of.

On October 3, 1932, Dustin filed a petition in this cause, from which it appears that the complainant Eva Cohen was entitled to the sum of \$3,224.02, representing moneys due her by the terms of the decrees of foreclosure and sale, which amount the receiver was unable to pay on account of the closing of the Citizens State Bank of Chicago. The petition prays that a rule be entered on The Fidelity and Casualty Company of New York to show cause why an order should not be entered compelling the surety company to pay Eva Cohen the sum of \$3,224.02. A rule was entered by the court, returnable on October 6, 1932. Thereafter this rule was continued several times, and finally the cause was submitted to the court as to whether, under the circumstances,

is the time of the application for the bond, the receiver  
signed an application dated January 4, 1933, which contained a pro-  
vision to save the liability and liability company of New York National  
and indemnify it for any and all damage, loss or expense for which  
it may become liable. On or about March 22, 1933, Martin, as  
receiver, filed his report and account with the court, accounting for  
the receipt and expenditure of moneys in his hands amounting to  
\$3,838.02. Thereafter, the court entered an order on September 6,  
1933, that the sum of \$3,838.02 be paid to the receiver, the sum of the  
lien of the indebtedness and the compensation under the terms of the  
deed of gift in the sum of \$3,838.02.

In December 19, 1933, Martin filed with the court a  
petition stating that on, the receiver, was unable to comply with the  
order of September 6, 1933, because of the date of the entry  
of this order he had expended the receivership funds with the  
Citizens State Bank of Chicago, which bank was closed on May 12, 1933,  
by the effect of certain provisions of the State of Illinois, and  
efforts to obtain the sum of \$3,838.02 from the bank for the sum  
of \$3,838.02, and pay the sum of \$3,838.02 to the receiver of September  
6, 1933. This motion is still pending and is not disposed of.

On October 2, 1933, Martin filed a petition in this court,  
from which it appears that the complaint was taken was entitled to  
the sum of \$3,838.02, representing moneys due her by the terms of the  
deed of gift and will, which names the receiver and Martin  
as payee of the sum of \$3,838.02, the balance due her by the terms of the  
will and petition of the court, entered on September 6, 1933.  
The petition says that a writ be entered on the liability and liability  
company of New York to show cause why an order should not be entered  
requiring the company to pay the sum of \$3,838.02 to the receiver,  
a writ be entered on the court, returnable on January 4, 1934.  
Thereafter this case was assigned to the court, and Martin the  
court was satisfied to the court to be satisfied, after the assignment,

the surety was liable, and written briefs were filed by the parties to this proceeding. The court took the matter under advisement, and the question is still undetermined.

On January 25, 1933, a suit was filed in the Municipal Court of Chicago on the receiver's bond executed by Dustin and the surety company, entitled, "The People of the State of Illinois for the use of Eva Cohen, against The Fidelity and Casualty Company of New York." The statement filed by the plaintiff alleges the facts appearing in the record, which are herein set forth. The defendant surety company filed an affidavit of merits alleging non-liability under the bond, on the ground that the receiver had deposited the receivership funds with the bank, not in his individual capacity, but in his capacity as receiver, and that the receiver's failure to pay was due to the insolvency of the bank.

On May 5, 1933, on motion of the plaintiff, Eva Cohen, the surety company's affidavit of merits was stricken, The Fidelity and Casualty Company of New York <sup>elected</sup> to stand by its affidavit of merits, and on May 17, 1933, the defendant surety company was defaulted, and judgment was entered against it on plaintiff's affidavit of claim for \$2,884.37. This judgment was settled by the defendant surety company for \$1,850.

On October 2, 1933, The Fidelity and Casualty Company of New York filed a suit in the Municipal Court of Chicago, against F. T. Dustin to recover the loss sustained by the plaintiff as surety on Dustin's bond, and on October 25, 1933, Dustin filed a petition in the Superior Court of Cook County, praying that The Fidelity and Casualty Company of New York be restrained from prosecuting said suit against Dustin.

From the facts set forth in the petition filed by Dustin it appears, substantially, that the surety company's suit against Dustin is upon an alleged contract of indemnity given by Dustin at





the time of his application for the receiver's bond; that the surety company claims damages from Dustin for moneys paid to the holder of the second mortgage, at whose instance Dustin was appointed receiver of the property in question; that the moneys due the said holder of the second mortgage are on deposit with the Citizens State Bank of Chicago; that said bank was closed by the Auditor of Public Accounts of the State of Illinois, and that said funds are not now available and will not be until the assets of said bank are liquidated.

The Fidelity and Security Company of New York filed its verified answer, and on January 4, 1934, the court entered an order restraining the surety company from prosecuting the cause pending in the Municipal Court of Chicago against F. T. Dustin.

The law is well settled that if a surety has suffered a loss by reason of its suretyship, the surety is entitled to have the principal named in the bond make good the loss. The surety company in this case paid \$1,850 by reason of the failure of Dustin to pay the admitted amount in the hands of the receiver to Eva Cohen, and the surety company did not pay the \$1,850 until Eva Cohen filed a suit against the surety company and establish the amount due and judgment was entered for \$2,498.04, and the surety company by compromise settled this judgment for \$1,850.

The petition filed by Dustin does not charge facts which would warrant the granting of equitable relief by the court, and the court erroneously entered the restraining order preventing the surety company from prosecuting its suit in the Municipal Court against Dustin, who, as receiver, admitted that he collected the amount in question. The petition does not state facts which are a defense to this action in the Municipal Court, and the petition is utterly devoid of any equitable grounds that would justify the entry of a restraining order. The receiver assumes that the surety company was a party to

the time of his application for the receiver's bond; that the money  
was claimed through from Austin for money paid to the holder  
of the second mortgage, as where insurance money was deposited receiv-  
er of the property in question; that the money due the said holder  
of the second mortgage was on deposit with the Citizens State Bank  
of Chicago; that said bank was closed by the action of public  
authorities of the State of Illinois, and said bank was not  
available and will not be until the assets of said bank are liquidated.  
The liability and responsibility of New York State is  
verified answer, and on January 4, 1933, the court entered an order  
dissolving the trust company then operating and vesting in  
the Municipal Board of Chicago certain of its assets.  
The law is well settled that if a trust has entered  
a loss by reason of the bankruptcy, the money is entitled to have  
the principal named in the bond made good the loss. The money  
company in this case paid \$1,000 by reason of the failure of Austin  
to pay the principal named in the bond of the receiver of the trust,  
and the trust company did not pay the \$1,000 until the same was  
paid without the trust company and deposited the money was the  
judgment was entered for \$1,000.00, and the trust company by reason  
also settled said judgment for \$1,000.  
The petition filed by Austin does not charge that which  
would warrant the granting of equitable relief by the court, and the  
court respectfully returns the following order: Dissolving the trust  
company then operating in said in the Municipal Court of Chicago  
Austin, who, as receiver, admitted that he collected the money in  
question. The petition does not state facts which are relevant to  
this action in the Municipal Court, and the petition is hereby denied  
at any equitable remedy that would justify the entry of a restraining  
order. The court further orders that the trust company was a party to



the original proceedings, in which the receiver was appointed. This is not a fact, except that the surety was called into the Superior Court upon motion of the receiver for a restraining order, and the theory of the receiver that a court of equity having jurisdiction of a cause has the power to grant such ancillary or incidental relief as would be necessary to do complete justice between the parties, does not apply in this proceeding.

In this case the receiver admitted by his accounting the amount due and that he was unable to pay to the complainant in the original case the amount to be paid by order of court, for the reason that the amount was deposited in an insolvent bank. The surety company on the receiver's bond was required to make good the default of the receiver, as above set forth, and although the surety company gave notice to the receiver of the action of the court, the receiver took no steps to protect his rights, or to perfect an appeal from the judgment entered for the complainant by the court in the proceeding instituted by her in the Municipal Court.

For the reasons indicated in our opinion, the order restraining the Fidelity and Casualty Company of New York from prosecuting its suit in the Municipal Court of Chicago against F. F. Dustin, is reversed.

ORDER REVERSED.

HALL, R. J. AND WILSON, J. CONCUR.

The original complaint, in which the receiver was appointed, was not a bill, except that the money was called into the receiver's hands upon motion of the receiver for a restraining order, and the theory of the receiver that a court of equity having jurisdiction of a cause has the power to grant such relief or incidental relief as would be necessary to its complete justice between the parties, does not apply in this proceeding.

In this case the receiver admitted by his accounting the amount due and that he was unable to pay the same, and the original bill was amended so as to call for a bill of costs, but the receiver that the amount was deposited in an insolvent bank. The equity company on the receiver's bond was required to make good the default of the receiver, as above set forth, and although the equity company gave notice to the receiver of the action of the court, the receiver took no steps to protect his rights, or to protect an appeal from the judgment entered for the complainant was taken in the proceeding instituted by her in the Federal Court.

For the reasons indicated in our opinion, the order reversing the finding and decree of the equity company of New York from accounting its bill in the Federal Court at Chicago against F. T. Bailey is reversed.

It is so ordered.

WILLIAM F. ALLEN, Circuit Judge.

36891

ANTON TIBONIK,

(Plaintiff) Appellee.

v.

GAGE PARK BUILDING LOAN AND  
HOMESTEAD ASSOCIATION, a Corp.,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

274 I.A. 659<sup>2</sup>

Opinion filed March 14, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff secured a judgment in the Municipal Court in the amount of \$2,546 against the defendant for the wrongful conversion of a trust deed, principal note and other connected papers. The action was originally one for replevin.

From the facts it appears that the Gage Park Building Loan and Homestead Association, a corporation, organized under the Building Loan and Homestead Act of the State of Illinois had in its employ one Joseph Tomala, who was also the elected secretary for the corporation. The offices of the corporation consisted of one room which was also occupied by the secretary who appears to have been the only officer in charge of and present at the offices of the company.

At a regular meeting of the board of directors of the defendant corporation on August 12, 1929, the board authorized the purchase of what is known as the August Soltes loan on certain property located in Chicago. This loan amounted to \$2300, for which the defendant issued its check, payable to the order of August Soltes and delivered it to him at the time he endorsed the note in question. The trust deed was dated July 26, 1929, by which Soltes, a widower, in consideration of \$2300 to Joseph Tomala, trustee, conveyed certain described real estate to secure this note together with six interest coupons of \$69 each.

When the trust deed was produced at the trial it bore on its back the rubber stamp notation in red ink, "Gage Park Building





Loan and Homestead Association." The principal note itself contained the notation, "Payment of this note is secured by trust deed of even date to Joseph F. Tomala". On the back of the note was the same rubber stamp notation already referred to.

The check in question was endorsed by Soltes, cashed by the Depositors State Bank and charged to defendant's account. The proceeds were used by Soltes in paying for a previously existing mortgage on the same property.

In addition to acting as secretary of the defendant, Tomala was operating a real estate and mortgage loan business of his own on the premises and operated and rented a number of safety deposit boxes. There is evidence in the record to the effect that plaintiff had been acquainted with Tomala for several years and had bought other mortgages from him. In the latter part of June, 1931, plaintiff met Tomala at the Depositors State Bank by prearrangement and withdrew \$2300 from his account which he gave to Tomala and received therefor the trust deed and notes in question. The two then proceeded to Tomala's office where plaintiff purchased a safety deposit box in which he then placed the papers. On or about the middle of February, 1932, plaintiff went to Tomala's office, which was also the office of the Sage Park Building Loan and Homestead Association and took out the trust deed and notes and gave them to Tomala, as trustee, for the purpose of having a foreclosure suit started against the property. While the trust deed runs to Tomala, as trustee, the note itself was payable to the maker and by him endorsed in blank and provided that payments from its time were to be made at the office of the legal holder.

At the time the plaintiff gave the note and the trust deed to Tomala for the purpose of having foreclosure proceedings started, he received from him a receipt which stated that the note and trust deed were received by him from the plaintiff for the sole and only purpose of such foreclosure proceedings. Prior to this Tomala had already collected one of the interest coupon notes and had paid the proceeds

Loan and mortgage association." The principal note itself contained the notation, "Payment of this note is secured by trust deed of even date to Joseph L. Tomlin." On the back of the note was the same

notation with addition slightly altered to:

The check in question was endorsed by Tomlin, cashed by

the Depositary State Bank and changed to defendant's account. The

instrument was used by Tomlin in paying the mortgage indebtedness

in addition to acting as security of the defendant.

Tomlin was operating a real estate and mortgage loan business at his own on the premises and operated and rented a number of safety deposit boxes. There is evidence in the record to the effect that plaintiff

had been acquainted with Tomlin for several years and had bought other mortgages from him. In the latter part of 1921, plaintiff met

Tomlin at the Depositary State Bank by arrangement and withdrew \$2500 from his account which he gave to Tomlin and received therefor

the first deed and notes in question. The two then proceeded to

Tomlin's office where plaintiff purchased a safety deposit box in

which he then placed the money. On or about the middle of February,

1922, plaintiff went to Tomlin's office, which was also the office

of the late first building loan and mortgage association and took out the first deed and notes and gave them to Tomlin, as stated, for the

purpose of paying a mortgage and stated against the property.

While the first deed went to Tomlin, as stated, the note itself was

deposited in the safe and of his subject in bank and received that

instrument was to him and to be made at the office of the bank holder.

At the time the plaintiff gave the note and the first deed

to Tomlin the two parties at plaintiff's residence were standing in

plaintiff's room and a woman named Sarah who was not there then

were retained by him then the plaintiff for the note and only purpose

of with Tomlin's assistance. When in this Tomlin had already

collected one of the interest notes and had paid the interest



over to the plaintiff. Sometime in April, 1932, Tomala disappeared and his private business was closed. The trust deed and notes were found by the state examiner in March or April, 1932, among the assets of the Building and Loan Association. The state bank examiner testified that when he made his examination of the assets of the defendant company Tomala presented these papers as assets of that association.

It is defendant's contention that the trust deed and notes were at no time the property of Tomala and that he fraudulently converted them to his own use at the time of the sale to the plaintiff and therefore the plaintiff was not a bona fide purchaser for value; that the plaintiff also had notice that Tomala was not the owner because of the rubber stamp endorsement in red ink upon the papers and the fact that Tomala was named as trustee in the trust deed.

The plaintiff testified on direct examination that all the papers were in the same condition when produced at the trial as they were at the time he purchased them. In rebuttal, however, he testified that they were the same except that the rubber stamp notation was not on the documents. This became a controverted question of fact.

In support of the proposition that the trust deed showed on its face that Tomala was the trustee named therein, counsel cite Tollifson v. Middle States Investment Co., 253 Ill. App. 320; Owens v. Nagel, 334 Ill. 96.

In the case of Tollifson v. Middle States Investment Co., supra, while it held that such facts should place the purchaser upon notice, nevertheless, it also held that this was a question of fact for the consideration of the trial court or the jury in the event the case was tried by a jury.

In the case of Owens v. Nagel, supra, there was a directed verdict in the trial court in favor of the defendant in error and the

and his private business was closed. The street door and notes were found by the above examiner in March or April, 1932, among the assets of the building and loan association. The above bank examiner certified that when he made his examination of the records of the defendant company he also presented those papers as assets of said

It is defendant's contention that the items listed in the report were at no time the property of Tammie and that he fraudulently converted them to his own use at the time of the sale to the plaintiff and therefore the plaintiff was not a bona fide purchaser for value; that the plaintiff also had notice that Tammie was not the owner of the rubber stamp equipment in view of the fact that Tammie was named as trustee in the trust deed.

The complaint detailed an alleged conversation with all the persons were in the same condition when produced at the trial as they were at the time he purchased them. It related, however, he testified that they were the same except that the rubber stamp evidence was not on the document. This feature was overlooked by the jury.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the said Court, at the City of New York, this 10th day of May, 1964.

[illegible]

to the fact that the United States is not a democracy.

cause was reversed inasmuch as the note was payable to the trustee and so endorsed, and this was a warning to the defendant in error. That therefore the court erred in directing a verdict. The Supreme court in effect held that this was a question of fact which should have been submitted to the jury.

The trial court in the case at bar held as a proposition of law that "if plaintiff at the time he acquired said trust deed note and accompanying papers from Tomala had notice, either from the note itself or any of the accompanying papers, of any fact indicating that the ownership of said note was in Coge York Building and Loan Association, then the plaintiff did not then and there become an owner in due course." This was a correct proposition of law and evidenced the fact that the trial court took this question into consideration in arriving at its finding.

On the other hand it cannot be said that the defendant company was entirely without fault in the transaction. It authorized and directed Tomala, its secretary, to negotiate the loan to Soltes and to take the trust deed in his own name as trustee. The principal and coupon notes were made payable to the maker and endorsed in blank, and contained no reference to the trust deed. Plaintiff held the documents in his own possession in his safety deposit box for a considerable period of time, during which he collected one of the coupon notes. Any audit by the defendant company might have disclosed the true situation and the plaintiff might have been able to have protected himself against Tomala.

The secretary of a Building and Loan Association, in its agent through whom the corporation ordinarily communicates to the public. Thinkle v. Knell, 99 Ill. App. 374; Emirie State Loan Assn. v. Gorrie, 137 Ill. 414. If the plaintiff in this case had sought to make inquiries in regard to the ownership of the trust deed and note, he would naturally have made such inquiries of the secretary who was



in effect said that this was a revelation of fact which should have been submitted to the jury.

The trial court in the case at bar held as a proposition of law that "all plaintiffs at the time he was injured said that they were accompanied by someone from Toledo and either from the same family or one of the accompanying persons, or any first accompanying person." This was a correct proposition of law and evidence.

The fact that the trial court took this question into consideration

On the other hand it cannot be said that the defendant company was actually engaged in the transaction. It authorized and directed Lammie, its secretary, to negotiate the loan to Gifford and to take the great deal in his own name as directed. The principal and coupon notes were made payable to the order and endorsed in blank and contained no reference to the trust fund. Lammie sold the bonds made in his own possession in his capacity as such for a considerable period of time, during which he collected one of the coupon notes. If held by the defendant company might have disclosed the true situation and the plaintiff might have been able to have recovered.

Lammie's answer denied.

[illegible]

the only officer of the corporation in charge of its affairs. The testimony discloses that none of the other officials of the company were ever present at its offices except at rare intervals.

While a person can transfer no better title than he has, nevertheless, the rule is that where a true owner permits another to appear as such and clothes him with apparent ownership and authority to deal with property so that an innocent third person is misled, the true owner will be estopped from disputing the title which said real owner has caused or allowed to appear to be vested in another. Brain v. La Grange State Bank, 303 Ill. 530. In a case where one of two innocent persons must suffer, the rule is that the one who placed <sup>in</sup> the power of a third person the opportunity to commit the wrong should bear the loss. Fenton v. Young, 333 Ill. App. 515.

All these facts had to be considered in order to arrive at a just conclusion as to where the loss should fall. The cause was tried by the court without a jury. All the facts and circumstances were before the court for his consideration. We are of the opinion that there was evidence to justify its finding and we cannot say its finding is so manifestly against the weight of the evidence as to cause us to hold otherwise.

We see no reason for disturbing the judgment and for that reason the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND KESSEL, J. CONCUR.





38704

LILLIAN WERENS,

Appellant,

v.

LARRANCE AVENUE NATIONAL BANK OF  
CHICAGO, a corporation, and  
FRANK J. CINCAL, Receiver thereof.

Appellees.

APPEAL FROM

CIRCUIT COURT,

COKE COUNTY.

274 I.A. 659<sup>3</sup>

Opinions filed March 14, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This was an action brought by the plaintiff to recover the sum of \$3,900, being the amount deposited by her in one of the safety deposit boxes under the control and management of the defendant by virtue of a lease or contract and which sum it was charged was lost through the carelessness and negligence of the defendant company. The trial was before the court without a jury, resulting in a finding by the court in favor of the defendant and judgment on the finding, from which judgment this appeal has been taken.

The fact that the plaintiff had this amount of money in the deposit box rented by her is not disputed, but from the evidence it appears that on January 1, 1931, burglars broke into the vault of the defendant company and opened and demolished certain deposit boxes located on the premises, among which was the box leased by the plaintiff.

Defendants claim that at the time of the burglary the bank was exercising ordinary care in and about the custody of plaintiff's deposit and was, therefore, not liable for the loss.

The contract between the plaintiff and the defendant bank provided, among other things: "The liability of the bank is expressly limited to the exercise of ordinary diligence to prevent the opening of the within mentioned safe during the within mentioned term, or any extension or renewal thereof, by any person other than the renter or his duly authorized representative, \* \* \* " This stipulation in the

2741A.650

Opinions filed March 14, 1934

... THE COURT ...  
... THIS WAS AN ACTION BROUGHT BY THE PLAINTIFF TO RECOVER ...  
... THE SUM OF \$1,000, WITH THE INTEREST ACCRUED BY PAY IN ONE OF THE ...  
... BELONGING TO THE DEFENDANT UNDER THE CONTROL AND MANAGEMENT OF THE DEFENDANT ...  
... AND BY VIRTUE OF A LOAN ON ACCOUNT AND WHICH WAS IT WAS CHARGED ...  
... WAS LOST THROUGH THE NEGLIGENCE AND NEGLIGENCE OF THE DEFENDANT ...  
... COMPANY. THE COURT HAS ORDERED THE COURT TO ...  
... IN A FINDING BY THE COURT IN FAVOR OF THE DEFENDANT AND JUDGMENT ON ...  
... THE FINDING, FROM WHICH JUDGMENT THIS CASE HAS BEEN TAKEN. ...  
... THE FACT THAT THE PLAINTIFF HAD THIS ACCOUNT OF MONEY IN ...  
... THE DEPOSIT WAS MADE BY HER IT WAS DISCUSSED, BUT FROM THE EVIDENCE ...  
... IT APPEARS THAT ON JANUARY 14, 1931, THE DEFENDANT HAD THE ACCOUNT IN ...  
... THE DEFENDANT COMPANY AND ORDERED AND CANCELLED CERTAIN DEPOSIT BOXES ...  
... LOCATED ON THE PREMISES, WHICH WAS THE NOW LOCATED BY THE ...  
... PLAINTIFF. ...  
... DEFENDANT CLAIMS THAT AT THE TIME OF THE BURGLARY THE ...  
... BANK WAS CLOSING REGULARLY AND IN THE MIDDLE OF THE ...  
... THE CONTRACT BETWEEN THE PLAINTIFF AND THE DEFENDANT BANK ...  
... PROVIDED, AMONG OTHER THINGS: "THE LIABILITY OF THE BANK IS EXPRESSLY ...  
... LIMITED TO THE EXTENT OF ORDINARY NEGLIGENCE TO PREVENT THE CLOSING ...  
... BY THE PLAIN ...  
... EXTENSION OF GENERAL THEORY, BY ANY PERSON OTHER THAN THE OWNER OR ...  
... THE ONLY ...

agreement is simply an expression of the common law liability of the defendants.

The defendant, The Lawrence Avenue National Bank of Chicago, a corporation, closed its doors on January 2, 1931, the day after the robbery, and the receiver has been joined in this action as co-defendant.

The building of the defendant bank was located at the corner of Lawrence and Sawyer avenues, two intersecting streets in the City of Chicago, with its main entrance on Lawrence avenue and a side entrance on Sawyer avenue. On January 1, 1931, its officials were George I. Pilat, president, John J. Jeffries, vice-president and cashier, and John E. Malloy, assistant cashier.

The entrance to the bank had three doors, two of which were held in position by means of bolts in the floor and the middle one had a lock. There was glass in the middle door so that it was possible to see in or out of it. Within the bank there was a vault with two doors. The front portion of the vault was used for safety deposit boxes and the other portion was used for the cash belonging to the defendant and between the two there was a partition and a steel door. Within the vault there was an electric light which could not, however, be seen from the street. The ledgers and books of record were kept in the north end of the vault, while the books and records of the safety deposit division were kept alongside of the safety deposit box vault in the front end of the bank.

On the day of the burglary in question, Malloy had been taking off a statement of the affairs of the bank and for that purpose had opened the vault and taken the general record books out and placed them on the bookkeeper's desk in the north end of the bank where he was at work.

The bank did not employ a special police officer either by day or night, but they had a man on the bank floor during the day



agreement is simply an expression of the common law liability of

the defendant.

The defendant, The Investment Company, Limited, was at

Chicago, a corporation, created its share on January 2, 1921, the day

after the robbery, and the receiver had been joined in this action

as co-defendant.

The building of the defendant bank was located at the

corner of Lawrence and Taylor streets, two intersecting streets in

the city of Chicago, with its main entrance on Lawrence street and

a side entrance on Taylor street. On January 1, 1921, the officials

were James J. Ryan, president, John J. Brennan, vice-president and

cashier, and John J. Sullivan, assistant cashier.

The entrance to the bank had three doors, two of which

were built in position to admit of passage in the front and the middle

one had a lock. There was glass in the middle door so that it was

possible to see in or out of it. Within the bank there was a vault

with two doors. The inner opening of the vault was built into the wall

between the two doors and the outer opening was built into the wall between

the two doors and between the two doors was a partition wall and a door

door. Within the vault there was an electric light which could not

be opened, but was fixed in the wall. The partition wall between the two

doors in the vault and the vault, while the doors and windows of the

vault against the wall were built into the wall between

the vault and the vault and the vault.

On the day of the robbery in question, Sullivan had been

making a statement of the affairs of the bank and for that purpose

had opened the vault and taken the general record books out and placed

them on the bookkeeper's desk in the vault and at the bank where he

was at work.

The bank did not employ a special police officer

at the time of the robbery, but had a guard on the bank during the day

and another one who cleaned up at night, who also acted as night watchman. The receiving teller's cages were on the left side of the bank as one entered the door and there was an alarm button in the receiving teller's cage. There were also buttons connected with a signal alarm which could be operated from every officer's desk and the cages, but no button at the entrance door.

The bank had been in bad financial shape for sometime and during the last few days of December negotiations were pending in the hope of perfecting a consolidation of the defendant bank with the Montrose Trust & Savings Bank. In order to effect this consolidation it was necessary to secure the signatures of the Comptroller of Currency and that of the State Auditor of Illinois. The capital of the bank was badly impaired and it was operating at a deficit. It had to do its daily circumstances on a cash basis. Laybarn, the national bank examiner was making every effort to effect the consolidation and Malloy had been requested by the president, Filat, to prepare a statement on December 31, 1930, which was necessary to present at a meeting of the state bank examiner, at the office of the national bank examiner on January 1, 1931. It was this work that took Malloy to the bank on the day of the robbery and he was preparing this statement at the time.

Malloy testified that he had been directed by the president of the bank to get the time locks to open at three o'clock on the afternoon of January 1, 1931, and that he arrived at the bank about 10 o'clock on the morning of that day and took up the books and prepared to draw the statement; that about 11 o'clock the telephone rang and that some person claiming to be Laybarn, the chief bank examiner, asked if the time lock was set for Friday morning, to which Malloy replied that they were set to run off that same afternoon; that this person said: "We are going to close your bank and I am going to send two men out to seal the vault." Malloy testified

and another one who claimed to be a night watchman, who also acted as night

watchman. The receiving officer's name was on the left side of

the bank as one entered the door and there was an alarm button in

the receiving officer's cage. There were also buttons connected with

a signal alarm which could be operated from every officer's desk

and the cage, but no button at the entrance door.

The bank had been in bad financial shape for sometime

and during the last few days of December negotiations were reaching in

the hope of perfecting a consolidation of the defendant bank with

the Northern Trust & Savings Bank. In order to effect this consoli-

dation it was necessary to secure the signatures of the board of

directors and that of the State Auditor of Illinois. The capital

of the bank was badly impaired and it was operating at a deficit.

It had to be its daily expenses on a cash basis. Payment, the

National Bank examiner was making every effort to effect the consoli-

dation and Bailey had been received by the president, first, to

secure a statement as to the condition of the bank, which was presented in

present at a meeting of the State Bank examiner, at the office of

the National Bank examiner on January 1, 1901. It was this work

that took Bailey to the bank on the day of the robbery and he was

operating this statement at the time.

Bailey testified that he had been directed by the presi-

dent of the bank to get the time taken to make a check of the bank

the afternoon of January 1, 1901, and that he arrived at the bank

about 10 o'clock on the morning of that day and took up the books

and reported to him the statement that about 11 o'clock the

defendant told him that some person claiming to be a night watchman, the chief

bank examiner, about 11 o'clock the time bank was not for Friday morning.

He stated further that they were not to run off this case

afterward that this person said: "I am going to show you what can

I am going to show you what can be done with the money." Bailey testified



further that he went to work on the books for about an hour and a half and that he then heard the front door rattle and he went to the front door which was locked and there were two men standing on the outside; that he opened the door without questioning them and let them in; that as he locked the door again and turned around he found himself covered by two revolvers; that one of the two men went to the rear door of the bank and let in two other men who carried burlap bags; that they then forced him to try the combination on the cash vault, but it did not open and they then compelled him to try the combination on the safety deposit vault and this door opened at 1 o'clock; that they then proceeded to open and rifle the safety deposit boxes until about 3 o'clock in the evening.

Malloy testified further that after the men left the bank he was forced to accompany them at the point of a gun and that they then placed him in the front seat of his own car and forced him to drive to Milwaukee, where the two men jumped out and disappeared; that he thereupon drove to the police station at Milwaukee and reported the robbery.

Counsel for plaintiff point out certain facts which he claims are significant, namely, that there was no watchman or assistant with Malloy at the time of the burglary; that Malloy did not interrogate the person whom he claimed called him on the telephone in order to find out whether it was Leyburn, the national bank examiner; that he did not question the two men who appeared at the door or ask for credentials before letting them in; that Malloy admitted that he made a mistake in setting the time clock on the safety deposit vault at 1 o'clock instead of 3 o'clock; that the bank should have provided a more efficient system of burglar alarms and that from the evidence it appears that in addition to taking the cash and contents of the safety deposit boxes, the burglars took a number of pages of the ledgers of the bank. It is argued from this last

Further that he went to work on the door for about an hour and a half and that he then heard the front door open and he went to the front door which was locked and there were two men standing on the outside; that he opened the door without questioning them and let them in; that as he looked the door again and turned around he found himself covered by two men; that one of the two men went to the rear door of the bank and let in two other men who carried bulge bags; that they then turned him to try the combination on the door; that they then opened it and it did not open and they then compelled him to try the combination on the safety deposit vault and this door opened at 1 o'clock; that they then proceeded to open and fill the safety deposit boxes which were closed in the evening.

Wally testified further that after the men left the bank he was forced to accompany them to the place of a gun and that they then placed him in the front seat of his own car and forced him to drive to Milwaukee, where the two men turned out and disappeared; that he thereafter drove to the police station at Milwaukee and reported the robbery.

Council for Plaintiff asked and received from which he obtained and admitted, namely, that there was no witness or one sent with Wally at the time of the burglary; that Wally did not interrogate the person whom he claimed called him on the telephone in order to find out whether it was Layman, the national bank manager; that he did not question the two men who appeared at the door or ask for credentials before letting them in; that Wally admitted that he was a witness in seeing the two men as the entry agents and at 1 o'clock entered at 1 o'clock; that the bank would have provided a more efficient system of burglar alarm and that from the evidence it appears that in addition to being the cash and contents of the safety deposit boxes, the burglar took a number of papers of the ledger of the bank. It is argued from this last



fact that there may have been something that Bailey or the officials desired to have covered up.

On the other hand it is contended by defendant that the officials of the bank, including Bailey, were working under a strain and Bailey knew that the president and vice-president were meeting with the state bank examiner at the office of the national bank examiner on that day and were very liable to keep in touch with him in order to effect the consolidation; that it was not unreasonable for Bailey to believe that the men who presented themselves were from the office of the bank examiner as the defendant bank had feared for a number of days that it would be closed by the public officials.

The rule of law in this state is clear. The defendant was engaged in the business of operating a safety deposit vault and was a bailee for hire. Under such conditions as these the defendant received the property and its failure to return it, raises a presumption that the loss was due to its negligence and the law imposed upon it the burden of showing that it exercised the degree of care required by the nature of the bailment. The defendant was required to exercise ordinary diligence and that degree of care or caution that a man of ordinary prudence or discretion would use with reference to the care of the particular thing, were it his own property.

Schaefer v. Safety Deposit Co., 251 Ill. 43.

The cause having been tried by the court without a jury, it is presumed that the court had in mind these rules of law in making its decision. The case resolves itself into a question of fact and were it before us in the first instance we might have held contrary to the holding of the trial court, but we are limited in our consideration of the cause by the rule which requires us to give full faith and credence to the finding of the trial court who heard and saw the witnesses and had a better opportunity to pass upon the facts than we would have upon review. It cannot be said that the finding of the



fact that there may have been something that Wiley on the evidence  
designed to have covered up.

On the other hand it is contended by defendant that the  
officials of the bank, including Wiley, were working under a strain  
and Wiley knew that the president and vice-president were meeting

with the state bank examiner at the office of the national bank  
examiner on that day and were very likely to keep in touch with him  
in order to effect the concealment; that it was not unreasonable

for Wiley to believe that the new the proposed executives were from  
the office of the bank examiner as the defendant bank had feared for  
a number of days that it would be closed by the public officials.

The rule of law in this state is clear. The defendant  
was engaged in the business of operating a safety deposit vault and  
was a public utility. It was a public utility of the state.

received the property and the failure to return it, made a wrong  
claim that the loss was due to the negligence and the law imposed  
upon it the burden of proving that it exercised the proper of care

required by the nature of the bailment. The defendant was required  
to exercise ordinary diligence and that failure to do so was  
that a man of ordinary prudence or discretion would not with reference

to the care of the particular thing, were it his own property.  
Roberts v. State Bank, 101 Ill. 42.

The court having been asked by the court without a jury,  
it is presumed that the court had in mind those rules of law in making  
its decision. The case resolves itself into a question of fact and

with it before us is the first question to which we shall now  
be the holding of the trial court. But we are limited in our examination  
of the facts by the rule which requires us to give full effect

and evidence to the finding of the trial court who heard and saw the  
evidence and had a better opportunity to pass upon the facts than  
we could have from the record. It cannot be said that the finding of the

trial court is so manifestly against the weight of the evidence as to necessitate a reversal of the judgment. Questions as to the degree of care in cases such as this are eminently questions for the trial court or the jury.

For the reasons stated in this opinion, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HALL, F.J. AND MOORE, J. CONCUR.

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THE UNIVERSITY OF CHICAGO

Journal of Management Inquiry 20(4) 403-418



36793

LENA SHERMAN,

Complainant,  
v.

CARL H. OLSON, et al,  
Defendants.

HENRY F. SIMMONS, et al, etc.,  
Cross-Complainants,  
Appellants,

v.

CARL H. OLSON, et al,  
Cross-Defendants.  
Lena Sherman,  
Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

274 I.A. 659<sup>4</sup>

Opinion filed March 14, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order sustaining a demurrer of the complainant to a cross-bill filed in the cause in which she was made cross-defendant. The cross-bill was ordered stricken from the files and from this order an appeal was taken to this court.

The original bill prayed the foreclosure of a trust deed. Complainant and cross-complainants were owners of bonds secured by this trust deed and their interests were identical.

It is the contention of cross-complainants that section 17 of the Illinois Mortgage Act provides that in a foreclosure suit, a deficiency may be entered for any balance due the complainant over and above the proceeds of the sale, and that therefore it becomes necessary to be a complainant or cross-complainant in order to avail oneself of the benefits of this enactment. The answer to this lies in the original bill in which it is prayed that the bondholders (which include cross-complainants,) have a deficiency decree in favor of the person or persons entitled thereto. The relief prayed for in the cross-bill is already asked for in the original bill. The rights of the defendants to the bill under their answer in which their interests fully appear will be protected after hearing by the decree entered in the proceedings. Where the rights of a defendant

274 I.A. 659

Opinion filed March 14, 1934

This is an appeal from an order sustaining a demurrer to the complaint as a cross-bill filed in the same in which the cross-bill was entered without leave of the court. The cross-bill was entered without leave of the court and this order on appeal was taken to this court. The original bill prayed for the foreclosure of a trust deed. Complaint and cross-complaints were entered of record. Answer to this trust deed and reply thereto were identical. It is the contention of cross-complainants that section 17 of the Illinois Mortgage Act provides that in a foreclosure suit a defendant may be entered for any balance due the complainant over and above the proceeds of the sale, and that therefore it becomes necessary to be a complainant or cross-complainant in order to avail oneself of the benefit of this enactment. The answer to this bill in the original bill is that it is proper that the defendant (which is not a complainant) have a liability to pay in favor of the complainant or cross-complainant. The bill prayed for in the cross-bill is already asked for in the original bill. The rights of the defendant to the bill under their answer in which their interest bill would be sustained after having by the same entered in the proceedings, leave the rights of a defendant

appear from his answer they will be fully protected. Sittner v. Field, 354 Ill. 315.

Cross-complainants urge that their cross-bill was necessary in order to extend the receivership as to include their bonds and afford them the protection of the receivership. The prayer of the original bill, however, asks for a receivership for the benefit of all the bondholders and this includes cross-complainants. By order of court this was done. Cross-complainants could obtain no more relief by their cross-bill. Their rights are already safeguarded by order of court.

In our opinion the allegation in the original bill to the effect that defendants waived all rights under the homestead laws of the State of Illinois together with a description of the trust deed and proffer of the instrument on the hearing, sufficiently covers the allegation of waiver of homestead. The answer of the owners of the equity not being abstracted we are not advised whether this allegation is or is not controverted.

The original bill appearing to pray the same relief as that prayed for in the cross-bill the latter is not necessary and the demurrer to the cross-bill was therefore properly sustained. Roby v. South Park Coars., 253 Ill. 575.

For the reasons set out in this opinion, the order of the Circuit Court is affirmed.

ORDER AFFIRMED.

HALL, P.J. AND HERBEL, J. CONCUR.



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36899

CENTRAL REPUBLIC BANK AND TRUST  
COMPANY,

Complainant - Appellee,

v.

ARCYLS-KERMONS BUILDING,

Defendant.

ON APPEAL OF OLIVER J. SALINGER,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

274 I.A. 659<sup>5</sup>

Opinion filed March 14, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court denying Salinger, the holder of a \$500 bond, leave to intervene in a foreclosure suit brought by complainant, as trustee, to foreclose a first mortgage bond issue amounting to \$210,000. The bond owned by the petitioner was of the same issue sought to be foreclosed in the original proceeding. The petition contains certain allegations to the effect that he, Salinger, has now learned for the first time that the mortgage was in default for a long time; that he was paid interest to August 1, 1931, in order to conceal from him the default; that complainants with knowledge of these facts failed to make bondholders parties, but took proof before the Master in Chancery where it sought to place all bonds on a parity; that for the purpose of coercing the bondholders to place their bonds with a committee selected, they, the bondholders, were threatened that the committee would purchase the property at a nominal bid; that the complainant was not a proper trustee to act for the reason that it was represented on the committee by one of its officers; that it was negligent in its duties to permit default in monthly deposits and nonpayment of taxes and in concealing the facts from the bond owners; that its interests were in conflict with those of the purchasers of bonds and that it was disqualified to act as trustee because it had pledged its assets as security with the Reconstruction Finance Corporation for a loan

274 I.A. 659

Opinion filed March 14, 1934

THE COURT HAS REVIEWED THE RECORD IN THIS CASE. THIS IS AN APPEAL FROM AN ORDER OF THE DISTRICT COURT. THE ORDER WAS MADE ON A MOTION FOR A WRIT OF HABEAS CORPUS. THE PETITIONER CLAIMS THAT HE WAS DETAINED WITHOUT CAUSE AND WITHOUT A TRIAL. THE RECORD SHOWS THAT THE PETITIONER WAS DETAINED IN THE DISTRICT COURT. THE DISTRICT COURT HAS ORDERED THAT THE PETITIONER BE RELEASED. THE COURT HAS REVIEWED THE RECORD AND HAS CONCLUDED THAT THE DISTRICT COURT WAS CORRECT IN ITS ORDER. THE PETITIONER'S MOTION FOR A WRIT OF HABEAS CORPUS IS GRANTED. THE PETITIONER IS ORDERED TO BE RELEASED. THE COURT HAS REVIEWED THE RECORD AND HAS CONCLUDED THAT THE DISTRICT COURT WAS CORRECT IN ITS ORDER. THE PETITIONER'S MOTION FOR A WRIT OF HABEAS CORPUS IS GRANTED. THE PETITIONER IS ORDERED TO BE RELEASED.



and was, therefore, out of the trust business.

The allegations in the petition consisted mostly of conclusions unsupported by allegations of any particular facts. No bondholder has an absolute right of intervention especially in the absence of fraud, misfeasance or bad faith on the part of the trustee. American, etc. Co. v. 180 East Delaware Building Corporation, at 31, 359 Ill. App. 37. Bondholders are not necessary or proper parties to a foreclosure proceeding. Firebaugh v. Traff, 353 Ill. 83.

The motion was addressed to the sound discretion of the chancellor. The matter was pending before him and he was familiar with the pleadings in the cause and such other steps as had been perfected. Petitioner's claim amounted to a very small fractional per centage of the total bond issue and there was in the opinion of the chancellor evidently no purpose in increasing the cost and adding to the delay of the foreclosure proceeding. Petitioner's interests should be protected fully by the chancellor. If the sale price is only nominal, as petitioner claims it will be, it can be corrected by the court on the objection of any bondholder.

We see no reason for disturbing the order of the Circuit Court in refusing petitioner leave to intervene.

For the reasons stated in this opinion, the order of the chancellor denying petitioner leave to intervene is affirmed.

ORDER AFFIRMED.

HALL, F.J. AND NEBEL, J. CONCUR.

and, therefore, out of the Court's jurisdiction.

The allegations in the petition consisted mostly of

statements attributed to witnesses of the defendant's conduct.

It is submitted that an absolute right of intervention especially in

the absence of fraud, misfeasance or bad faith on the part of the

petitioner, American, etc., v. The Bank of America, N.Y. & C.

1904, 210 N.Y. 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

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38308

MAPLE MANOR BLDG. CORPORATION,  
a Corporation,

Appellant,

v.

GEO. A. HEMINGWAY ORGANIZATION,  
INC., a Corporation,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

274 I.A. 660<sup>1</sup>

Opinion filed March 14, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

The plaintiff, Maple Manor Bldg. Corporation, recovered a judgment before a justice of the peace of Arlington Heights, Cook County, December 31, 1933, against the defendant Geo. A. Hemingway Organization, Inc.

January 8, 1934, the defendant filed its appeal bond to the Circuit Court of Cook County in the sum of \$300.00 and at the same time left its check for \$17.50 to cover the costs of filing in the Circuit Court. The bond and check were left with the son of the justice of the peace at Arlington Heights at the residence of the justice of the peace, he, himself, being out of town. This was done within the time for filing bond and perfecting the appeal.

On January 10, 1934, the justice of the peace cashed the check intended to cover the costs of the appeal. This also was within the time. The justice of the peace, however, failed to approve the bond within the time. Subsequently, the defendant appeared in the Circuit Court and the judge of that court directed the justice of the peace to send the papers to the Circuit Court for the purpose of a trial on appeal and this was done. Thereupon the plaintiff moved to dismiss the appeal on the ground that the court had no power to direct the justice of the peace to send the papers to that court. Even though this order might not have been enforceable, nevertheless, the papers were filed by the justice of the peace, and the Circuit Court consequently had jurisdiction of the cause.



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U.S. DEPARTMENT OF JUSTICE

Washington, D.C.

274 I.A. 680

Opinion filed March 14, 1934

The plaintiff, John Doe, a resident of the District of Columbia, brings this action against the defendant, Jane Smith, a resident of the same District. The complaint alleges that the defendant has wrongfully converted the plaintiff's property and has caused him damage. The plaintiff seeks recovery of the value of the property and costs of suit.

On January 15, 1933, the defendant filed the complaint in the District Court of the District of Columbia. The complaint was amended on January 22, 1933, to add a claim for punitive damages. The defendant filed a motion to dismiss the complaint on January 25, 1933, on the ground that the complaint failed to state a claim. The motion was denied on January 27, 1933.

The trial was held on February 1, 1934. The plaintiff presented evidence that the defendant had taken his property without his consent. The defendant presented evidence that she had found the property on the street and had no way of knowing who it belonged to. The jury found in favor of the plaintiff and awarded him \$100.00 and costs.

The defendant has appealed the judgment of the District Court to this Court. She argues that the judgment is erroneous because the evidence was insufficient to support it. She also argues that the District Court erred in awarding punitive damages. The plaintiff argues that the evidence was sufficient to support the judgment and that the award of punitive damages was proper.

On this appeal, the Court is asked to reverse the judgment of the District Court. The Court has considered the arguments of both parties and the evidence presented at the trial. It is the opinion of the Court that the judgment of the District Court is affirmed. The award of punitive damages is also affirmed.

It is also insisted that the bond was not filed and approved within the time allowed by the statute. The record shows that the bond was filed within the time and evidently came into the possession of the justice of the peace, because of the fact that he cashed the check which accompanied it, which was to pay for the expense of the appeal. All this was done within the time.

The defendant should not be penalized because of the failure of the justice to do that which the law imposed upon him.

Hartshorn v. Bessan, 237 Ill. App. 295.

The order of the court overruling the motion to dismiss the appeal was not a final order. If the trial court had allowed the motion and had dismissed the appeal, the situation would have been different as it would have been a final order.

For the reasons stated in this opinion the appeal will be and hereby is dismissed.

ALL RIGHTS RESERVED.

HALL, P.J. AND HESSEL, J. CONCUR.

It is also insisted that the same was not filed and

approved within the time allowed by the statute. The record shows that the bond was filed within the time and evidently came into the possession of the Justice at the proper time of the fact that he reached the office which accompanied it, which was so far for the expense of the appeal. All this was done within the time.

The defendant should not be penalized because of the

failure of the Justice to do that which the law imposed upon him.

McIntosh v. McIntosh, 117 Ill. App. 232.

The order of the court overruling the motion to dismiss the appeal was not a final order. It was a ruling and allowed the action and not dismissed the appeal. The situation would have been different as it would have been a final order.

For the reasons stated in this opinion the appeal will

be and hereby is dismissed.

Very respectfully,

WILLIAM H. HARRIS, J. Clerk.



38933

PEOPLE OF THE STATE OF ILLINOIS,

(Plaintiff) Defendant in Error,

v.

WILLIAM GEORGE,

(Defendant) Plaintiff in Error.

APPEAL TO

MUNICIPAL COURT

OF CHICAGO

274 I.A. 660<sup>2</sup>

Opinion filed March 14, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This is a writ of error to review a judgment of the Municipal Court of Chicago finding the defendant guilty of pandering and imposing a sentence in the house of correction and a fine. A jury was waived by the defendant and the cause was heard by the court. The evidence is not preserved and the matters are presented on the common law record.

It is insisted that the information upon which the charge was based is insufficient in that it fails to allege the name of the woman from whom the money was obtained. The information is in the language of the statute and is brought by one Sarah Bell Elias, a prostitute, from whom the money was taken. While the name of the female is not set out in the information, it is charged that the money was part of the earnings of Sarah Bell Elias, the informant. In our opinion the information shows upon its face that the name of the female was Sarah Bell Elias. It is insisted also that the record fails to show that the defendant was furnished with a copy of the information prior to the trial.

The Supreme Court of this state in the case of The People v. O'Hara, 332 Ill. 436, in its opinion, says:

"The requirement of the statute that every defendant charged with a felony shall be furnished, before his arraignment, a copy of the indictment and a list of jurors and witnesses is directory, only, and in order to make the omission to comply with this requirement available on error the defendant must demand a copy of the indictment and a list of witnesses and preserve the evidence of such demand

IN THE STATE OF ILLINOIS,

(Plaintiff) Defendant in Error,

v.

WILLIAM BROWN,

(Defendant) Plaintiff in Error.

Opinion filed March 14, 1934

SYA I.A. 660

THE COURT HEREBY GRANTS THE WRIT OF HABEAS CORPUS.

This is a writ of error to review a judgment of the Municipal Court of Cook County, Illinois, in a case wherein the defendant, William Brown, was convicted of the crime of kidnapping. The record shows that the defendant was arrested on a warrant issued by the Municipal Court, and was held in custody for a period of ten days. During this time, the defendant was interrogated by the police, and a confession was obtained from him. The confession was read to the defendant, and he signed it. The defendant was then taken to the Municipal Court, where he was arraigned and pleaded guilty. The court found the defendant guilty and sentenced him to a term of imprisonment for a period of five years. The defendant appeals from this judgment, and asks that the writ of habeas corpus be granted.

It is noted that the information upon which the charge was based is insufficient in that it fails to allege the name of the woman from whom the money was obtained. The information is in the language of the statute and is brought by one James Bell Black, a prostitute, from whom the money was taken. While the name of the female is not set out in the information, it is averred that the money was part of the earnings of James Bell Black, the informant. In our opinion the information shows upon its face that the name of the female was James Bell Black. It is noted also that the record fails to show that the defendant was furnished with a copy of the information prior to the trial.

The Supreme Court of this state in the case of The People v. Brown, 102 Ill. 630, in its opinion, says:

"The defendant at the trial had every opportunity to examine the evidence and to cross-examine the witnesses. It was his duty to do so. The fact that he did not do so is no ground for granting the writ of habeas corpus. The defendant was not deprived of any right of defense."

in a bill of exceptions. (People v. Cunningham, 337 Ill. 45.)<sup>a</sup>

There is nothing in the record before us which shows that a demand was made for a copy of the information and denied.

It is also urged for reversal that the information failed to charge a crime. The information was in the language of the statute. No motion was made before trial to quash. Technical objections to indictments are waived by proceeding to trial. Technical objections to the indictment can not be raised by motion in arrest of judgment. The People v. Glassberg, 326 Ill. 373.

We see no reason for disturbing the judgment of the Municipal Court and for the reasons stated in this opinion the judgment is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.



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36957

MARY E. SULLIVAN, administratrix of  
the Estate of Mary Lundy, Deceased,

Defendant in Error,

v.

SOPHIA LICHTENSTEIN,

Plaintiff in Error.

1934

SUPERIOR COURT,

COOK COUNTY.

274 I.A. 660<sup>3</sup>

Opinion filed March 14, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This cause comes to this court on a writ of error to review a judgment entered in the Superior Court of Cook County for \$5,000 in favor of the plaintiff, Mary E. Sullivan, administratrix, against the defendant, Sophia Lichtenstein. The testimony not having been preserved by a bill of exceptions, a reversal is asked on the common law record alone. A motion for a new trial appears in the common law record. Motions for a new trial and in arrest of judgment should be preserved in the bill of exceptions.

It is insisted that the declaration did not state a cause of action. The original declaration consisted of one count and was filed May 23, 1928, and alleged that the defendant was the owner of and operated an automobile on May 27, 1928, in Chicago, and that Mary Lundy, the deceased, was invited to become a passenger in said automobile and the defendant undertook to transport her from one place in the city to another, but that the defendant negligently and carelessly operated the automobile and that by reason thereof it came into a collision with another automobile and that Mary Lundy was thrown from the car and injured, as a result of which she died on May 30, 1928.

The declaration averred that plaintiff had been appointed administratrix of the estate and that the deceased left her surviving certain heirs at law, naming them, and asked that the next of kin be recorded because of her death. The declaration also charges that

STATE OF NEW YORK  
IN SENATE  
January 14, 1934  
REPORT  
OF THE  
COMMISSIONERS OF THE  
LAND OFFICE  
IN RESPONSE TO A  
RESOLUTION PASSED  
BY THE SENATE  
JANUARY 10, 1934

274 I.A. 660

Opinion filed March 14, 1934

The Commission has the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the matter of the proposed amendment to the Constitution of the State of New York, relating to the apportionment of the members of the Senate and the House of Representatives. The Commission has given this matter the most careful consideration and has the honor to submit herewith its report thereon. The Commission is of the opinion that the proposed amendment is not in the best interests of the State and should not be adopted. The Commission is of the opinion that the present Constitution is well adapted to the needs of the State and that no change is necessary. The Commission is of the opinion that the proposed amendment is not in the best interests of the State and should not be adopted.

It is further stated that the Commission has no objection to the proposed amendment being adopted. The Commission is of the opinion that the proposed amendment is not in the best interests of the State and should not be adopted. The Commission is of the opinion that the present Constitution is well adapted to the needs of the State and that no change is necessary. The Commission is of the opinion that the proposed amendment is not in the best interests of the State and should not be adopted.

The Commission has the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the matter of the proposed amendment to the Constitution of the State of New York, relating to the apportionment of the members of the Senate and the House of Representatives. The Commission has given this matter the most careful consideration and has the honor to submit herewith its report thereon. The Commission is of the opinion that the proposed amendment is not in the best interests of the State and should not be adopted.



the next of kin suffered pecuniary loss by reason of the death of the deceased.

An amended declaration was filed January 18, 1931, which was practically in the words of the original declaration, except that it states that plaintiff's intestate at the time of the accident was in the exercise of due care for her own safety. The amended declaration was filed over a year after the death of plaintiff's intestate, but the cause of action is the same as that set out in the original declaration. The time and place of the accident, injuries sustained, the manner of death, the charge that the defendant was guilty of negligence in the operation of the automobile and the fact that the deceased left her surviving next of kin who suffered pecuniary loss by reason of her death, are identical, as originally charged.

It is urged that the declaration does not state a cause of action in that it does not aver; first, the existence of a duty on the part of the defendant to protect the plaintiff's intestate from the injury complained of; second, a failure of the defendant to perform that duty; third, an injury to the plaintiff's intestate from such failure; and fourth, there is no allegation in the declaration that the next of kin or beneficiaries were free from negligence.

Defendant strenuously urges that it was the duty of the plaintiff to set forth in her declaration what duty the defendant owed the plaintiff's intestate. A number of cases involving the liability of employers by reason of their failure to furnish a safe place to work and proper appliances, are cited, but these cases are wholly foreign to this sort of a proceeding. There was no duty on the part of the driver of the car, the defendant here, to protect plaintiff's intestate, but there was a duty to drive the car in a careful, proper manner so that plaintiff's intestate could not be injured. This allegation is contained in the declaration.

the fact of the defendant's knowledge of the facts of the case at the time of the commission of the same.

An expert testimony was also given by the defendant.

was presented in the form of the original question, and the fact is that the defendant's testimony at the time of the commission

was in the exercise of the right of the defendant to the same.

defendant was killed over a year after the death of the plaintiff's

interests, but the same is taken as the fact as it was not in

the original testimony. The fact and place of the defendant's

interests mentioned, the manner of death, the manner of the defendant's

and the fact of the defendant's knowledge of the facts of the case at the

fact that the defendant was not surviving until the time of the commission

of the crime is taken as the fact, and the defendant's knowledge of the

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The alleged failure of the plaintiff to plead in its declaration the second alleged error, namely, the failure of the defendant to perform the duty of protecting the plaintiff's intestate and also the third assignment of error, namely, that the declaration contained no charge that plaintiff's intestate was injured by reason of the failure of the defendant to furnish the proper protection, are all based upon the rule announced in the employer cases and, as already stated, those cases are not sustaining or in point in an action such as the one before us.

Defendant insists that the declaration contained no charge that the next of kin or beneficiaries were free from negligence. In support of this contention defendant cites a number of cases involving injuries to children where the negligence of the parents is a question to be considered, and relies upon the case of Molden v. Schley, 271 Ill. App. 158, and similar cases. These cases involved facts from which it appeared that the automobile was driven by the next of kin of the deceased. There is nothing in the record before us which would indicate in any manner that the defendant Sophie Lichtenstein was in any way related to plaintiff's intestate or numbered among her next of kin.

There appears to have been two trials resulting in favor of the plaintiff. We see no reason for disturbing the present judgment and for the reasons stated in this opinion the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.



The alleged failure of the plaintiff to bring to his attention the second alleged error, namely, the failure of the defendant to bring to his attention the plaintiff's negligence and also the other assignment of error, namely, that the defendant contended no charge that plaintiff's interest was injured by reason of the failure of the defendant to furnish the proper protection, are all based upon the rule announced in the earlier cases and, as already stated, these cases are not controlling or in point in an action such as the one before us.

Defendant contends that the decision contained no charge that the work of him or his employees was free from negligence. In support of this contention defendant cites a number of cases involving injuries to children where the negligence of the parents is a question to be considered, and relies upon the case of Boyd v. Boyer, 101 Ill. 47, 102, and similar cases. These cases involve facts from which it appears that the automobile was driven by the next of kin of the deceased. There is nothing in the record before us which would indicate in any manner that the defendant sought to establish in any way that the plaintiff's interest was injured by reason of the failure of the defendant to furnish the proper protection, and, as already stated, these cases are not controlling or in point in an action such as the one before us.

There appears to have been no trial resulting in favor of the plaintiff. We see no reason for disturbing the present judgment and for the reasons stated in this opinion the judgment of the Superior Court is affirmed.

THOMAS J. HARRIS,

26981

GALT DRUG COMPANY, INC., a  
Corporation,

Appellee,

v.

CONTINENTAL CASUALTY COMPANY,  
a Corporation,

Appellant.

ORIGINAL FILE

CHICAGO COURT

274 I.A. 660<sup>4</sup>

Opinion filed March 14, 1934

MR. JUSTICE GILSON DELIVERED THE OPINION OF THE COURT.

The Galt Drug Company, Inc., a corporation, brought its action on an insurance policy against the defendant Continental Casualty Company, under which the plaintiff was insured against loss by robbery. The court found against defendant and assessed damages of \$88. A copy of the policy was attached to the statement of claim. The policy contains the provision that the proof of loss shall be furnished the company within 30 days after the discovery of the loss.

Upon the trial one Simmons testified that he was the manager of the company and that he was held up in an alley back of his home and robbed of \$88, which it was claimed was the money of the plaintiff. He testified that he notified the police and the insurance company; that he never filed any loss in writing but gave a signed statement to the adjuster of the defendant company; that he did not read the statement signed by him. This was the only testimony concerning proof of loss as required by the policy.

At the end of the plaintiff's case the defendant sought to introduce in evidence a signed statement by the witness as to what took place, which the court refused to admit in evidence. This signed statement was the only evidence of a proof of loss by the plaintiff and in our opinion was essential for the purpose of proof

274 I.A. 660

Opinion filed March 14, 1934

The following opinion was rendered by the court in the case of The People vs. John J. Connelley, et al., a corporation, brought by the People of the County of Cook against the defendant corporation. The court found against the defendant corporation and assessed damages of \$100,000. A copy of the policy was attached to the statement of claim. The court further found that the provision in the policy of loss shall be forfeited and recovery within 60 days after the discovery of the loss.

From the facts and issues testified that he was the president of the company and that he was held up in an alley back of his house and robbed of \$100,000 which it was claimed was the money of the plaintiff. He testified that he notified the police and the insurance company; that he never filed any claim in writing but gave a signed check to the adjuster of the defendant company; that he did not read the statement signed by him. This was the only testimony concerning the loss as received by the policy.

At the end of the plaintiff's case the defendant sought to introduce in evidence a signed statement by the witness as to what had happened, which the court refused to admit in evidence. The signed statement was the same statement as a report of loss by the defendant and the court was dissatisfied by the failure of the



in compliance with the policy. The cause was tried by the court without a jury and there was no reason for not admitting this in evidence. It helped to bear out plaintiff's own case and we cannot understand why an objection was made to its admissibility. It contained the statement that Simmons was the owner of the business and took the money for his own use. While it was contradictory to the statement that the money was that of the plaintiff, it was also evidence of the fact of notice of robbery to the defendant and this notice was in writing.

The claim is for \$85 and it is unfortunate that a second trial should be required but, in our opinion, the judgment should be reversed.

We are not aided in arriving at our conclusion by briefs on the part of the plaintiff.

The judgment of the Municipal Court is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HALL, P.J. AND HERBEL, J. CONCUR.

It is admitted that the money was paid by the bank. The bank is not a party to the suit and it is not its duty to pay the money. It is the duty of the bank to pay the money to the person who is entitled to it. The bank is not a party to the suit and it is not its duty to pay the money. It is the duty of the bank to pay the money to the person who is entitled to it.

It is understood that the bank is not a party to the suit and it is not its duty to pay the money. It is the duty of the bank to pay the money to the person who is entitled to it. The bank is not a party to the suit and it is not its duty to pay the money. It is the duty of the bank to pay the money to the person who is entitled to it.

The claim is for \$100 and it is admitted that a second trial should be granted. The judgment should be reversed.

The court is in error in its conclusion by virtue of the fact that the judgment of the principal court is reversed and the case is remanded for a new trial.

REVEREND FATHER AND BROTHERS: I am very glad to hear of your success. I am very glad to hear of your success.

37040

MILDRED A. DAVIES,

Appellee,

v.

HARVEY BRYAN TRAYLOR, a  
Corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

274 I.A. 661<sup>1</sup>

Opinion filed March 14, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment against the defendant in the Superior Court for \$1500 in an action in trespass on the case for personal injuries.

The evidence shows that the plaintiff while walking along a sidewalk in the City of Chicago adjacent to the theatre building owned and operated by the defendant, was struck by a heavy sign which fell from the building and injured her. Upon the trial the jury found the issues in favor of the plaintiff and assessed her damages at the sum of \$2,000. Plaintiff entered a remittitur of \$500 and a judgment was entered on the verdict after remittitur.

This case has been twice tried and in each instance resulted in favor of the plaintiff. The first judgment was for \$2,500 and on appeal to this court the judgment was reversed. The cause is now here on a second appeal. The original action was reversed because of the testimony of an expert witness based upon an x-ray picture which indicated a fracture of the foot of the plaintiff. This witness testified that in his opinion, from an examination of the x-ray picture, the fracture was the result of the accident. Another and different picture taken on the day of the accident was introduced in evidence which showed the fracture was an old and not a new fracture.

Defendant contends here that the plaintiff cannot recover on the doctrine of res ipsa loquitur because of the fact that specific acts of negligence were charged in the various counts of the declaration; that the evidence does not support the verdict; that the verdict



100 A.I. 75

Opinion filed March 14, 1934

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[illegible]

is excessive and that the court admitted improper evidence. Each of these objections was presented on the former appeal to this court. We held in that case, Gen. No. 26120, Devies v. Marks Brothers Theatres, that the evidence was admissible under the declaration, and the same situation exists upon this appeal. We see no reason for changing our opinion in that regard. The evidence upon the trial in the cause now pending before us is very much the same as that upon the original hearing and we see no reason for disturbing the verdict by reason thereof.

The first verdict was for \$3,500 and the second verdict was for \$2,000. We do not consider this verdict excessive. The same evidence objected to on the previous hearing except that pertaining to the x-ray picture was adduced at the trial below on the second hearing of the cause and the reasons advanced for sustaining the rulings thereon in the first case are applicable to the situation as it is now presented to us on the second appeal. The juries have passed upon the questions of negligence and their verdicts have been sustained in each instance. The error in the former case having been corrected and there being no new or different questions raised on this appeal from those presented on the original hearing of the cause in this court, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P. J. AND BASSEL, J. CONCUR.





37013

F. F. BACKSTROM and F. BACKSTROM,  
doing business as F. F. BACKSTROM & SON,  
Defendants in Error,

vs.

NATIONAL WATCH AND JEWELRY COMPANY,  
a Corporation,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

274 I.A. 661<sup>2</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THIS OPINION OF THE COURT.

Plaintiffs sued in an action of contract for the purchase price as agreed of a specially constructed gathering machine manufactured for defendant under the terms of a written contract dated July 31, 1928. In their statement of claim they set up the written contract verbatim, and averred that the machine was constructed in conformity with its terms and was delivered to defendant September 7, 1928, and accepted by it; that defendant used the machine for some months but refused to pay for it as agreed.

The affidavit of merits admits the execution of the contract and the delivery of the machine on September 7, 1928, (seven days later than the time named in the contract), but alleges that the machine was defective and failed to perform the work for which it was designed; that plaintiffs attempted to repair the same but were unable to make it comply with the terms of the contract; that defendant then tendered it back, but that plaintiffs refused to accept it, whereupon defendant stored it in a public warehouse and notified plaintiffs of its action. The affidavit denied that anything was due.

There was a trial by jury and a verdict for plaintiffs in the sum of \$2000 (the contract price of the machine), upon which the court, overruling motions for a new trial and in arrest, entered judgment, to reverse which defendant sued out this writ of error.

Defendant argues that the verdict is contrary to the manifest

J. W. BARNETT and F. BARNETT,  
doing business as J. W. BARNETT & SON,  
Defendants in Error.

vs.

NATIONAL BICYCLE AND MOTOR COMPANY,  
Plaintiff in Error.

OF CHICAGO

IN THE CIRCUIT COURT

274 T.A. 681

AND WHEREFORE THE PLAINTIFF REQUESTS  
DECREED THE ORDER OF THE COURT.

Plaintiff sued in an action of contract for the purchase  
price an amount of a specially constructed kitchen machine manu-  
factured for defendant under the terms of a written contract dated  
July 21, 1928. In their statement of claim they set up the written  
contract verbatim, and averred that the machine was constructed in  
conformity with its terms and was delivered to defendant September  
7, 1928, and accepted by it; that defendant used the machine for  
some months but refused to pay for it as agreed.

The affidavit of merit admits the execution of the contract  
and the delivery of the machine on September 7, 1928, (seven days  
later than the time named in the contract), but alleges that the  
machine was defective and failed to perform the work for which it  
was designed; that plaintiff attempted to repair the same but were  
unable to make it comply with the terms of the contract; that de-  
fendant then demanded its price, but that plaintiff's refusal to ac-  
cept it, whereupon defendant stored it in a public warehouse and  
caused plaintiff's affidavit of its action. The affidavit denies that any-  
thing was due.

There was a trial by jury and a verdict for plaintiff in  
the sum of \$2000 (the contract price of the machine), upon which  
the court, overruling motion for a new trial and in arrest, entered  
judgment, so reversed which defendant sued out this writ of error.  
Defendant argues that the verdict is contrary to the manifest

weight of the evidence; that the court erred in its ruling on the admission and rejection of evidence, in denying the motion of defendant to declare a mistrial, in refusing to give instructions submitted by defendant and in refusing to mark certain written instructions submitted by defendant as "given" or "refused," as required by section 74 of chap. 110 of Cahill's Ill. Rev.State.1929.

As to this last point it is sufficient to say that the record discloses that the court instructed the jury orally according to the practice of the Municipal court in that respect, and that no objection was made or exception taken to the same as given nor request made by defendant for further oral instructions. Further, an examination of the record indicates that the written instructions which appear therein were never in fact presented to the trial judge at all. There was a request in writing at the close of all the evidence for an instructed verdict for defendant, which was denied. Apparently neither the court nor opposing counsel was ever given the opportunity to see the alleged written instructions tendered. Such being the state of the record, the point is wholly without merit.

The point urged as to the denial of the motion for the withdrawal of a juror and for a declaration of a mistrial is also without merit. The ground for the motion was an answer made by witness John Condon, a former employee of defendant, who had charge of the machine during the time it was used by defendant. Condon's evidence should have been produced as a part of plaintiffs' original case, but the court in the exercise of its discretion permitted him to testify in rebuttal. His testimony was very favorable to plaintiffs, and he was subjected to a severe cross examination, in the course of which counsel for defendant questioned him as follows:

- "Q. Buckstrom gave you some money, didn't he? A. No, sir.  
Q. Promised you some, didn't he? A. No, sir, only Ben Ritholz."



weight of the evidence; that the court erred in its ruling on the admission and rejection of evidence, in denying the motion of the defendant to exclude a material, in refusing to give instructions suggested by defendant and in refusing to mark certain written instructions submitted by defendant as "given" or "refused," as required by section 76 of chap. 110 of Statutes of 1922.

As to this last point it is sufficient to say that the record discloses that the court instructed the jury orally according to the practice of the Kentucky courts in that respect, and that no objection was made or exception taken to the same as given nor request made by defendant for further oral instructions. Further, an examination of the record indicates that the written instructions which were given to the jury were in fact presented to the trial judge at all. There was a request in writing of the close of all the evidence for an instruction verified for defendant, which was denied. Apparently neither the court nor opposing counsel was ever given the opportunity to use the alleged written instructions submitted. Such being the state of the record, the point is wholly without merit.

The point urged as to the denial of the motion for the withdrawal of a juror and for a declaration of a mistrial is also without merit. The ground for the denial was as stated by the court, John Gorman, a former employee of defendant, who had charge of the machine during the time it was used by defendant. Gorman's evidence should have been produced as a part of plaintiff's original case, and the court in the exercise of its discretion permitted him to testify in rebuttal. His testimony was very favorable to plaintiff, and he was subjected to a severe cross examination, in the course of which counsel for defendant questioned him as follows:

"Q. Recollection gave you some money, didn't he? A. Yes, sir.  
Q. Recollection you saw, didn't he? A. Yes, sir, only one  
"Witness"

Ben Ritholz was the secretary of defendant, and the answer was an accusation that he had tried to bribe the witness. Defendant made a motion to strike out the answer, and the court ordered that the last part of it should be stricken as not responsive. Defendant then made its motion to withdraw a juror and to declare a mistrial, which was denied. As a matter of fact, upon re-examination the witness Condon, without objection by defendant, testified in detail to an interview with Ritholz, in which Ritholz offered witness money for favorable testimony and suggested that he might go out of town to avoid testifying. Defendant cross-examined Condon as to this conversation, and Benjamin Ritholz in surrebuttal testified, denying that any such conversation took place. Probably the testimony had much influence upon the verdict of the jury, but the conversation was material and relevant, and it was for the jury to pass upon the facts.

Plaintiffs offered evidence tending to show that at the time the machine was delivered to defendant a one-half horse-power motor was attached thereto; that the power furnished by this motor was insufficient and was the cause of the failure of the machine to do the work as provided by the contract; that plaintiffs thereupon purchased and delivered a three horse-power motor with a speed reducer, and that when this was attached the machine functioned properly. It is urged that this evidence was inadmissible upon the theory that it varied the terms of the written contract. The contract said nothing whatever about what kind of motor should be attached to the machine, and the transaction with reference to the substitution of motors occurred long after the execution of the contract and after the machine was delivered. The admission of this evidence did not violate the rule against receiving parol evidence to vary the terms of the written contract, since the transaction was not prior to or contemporaneous with the making

Ben Nichols was the secretary of defendant, and the answer was in  
 connection that he had tried to bribe the witness. Defendant made  
 a motion to strike out the answer, and the court ordered that the  
 last part of it should be stricken as not responsive. Defendant  
 then made its motion to withdraw a jury and to declare a mistrial,  
 which was denied. As a matter of fact, upon re-examination the  
 witness London, without objection by defendant, testified in detail  
 to an interview with Nichols, in which Nichols offered witness  
 money for favorable testimony and suggested that he might go out of  
 town to avoid testifying. Defendant cross-examined London as to  
 this conversation, and Nichols in cross-examination testified,  
 denying that any such conversation took place. Probably the  
 testimony had much influence upon the verdict of the jury, but the  
 conversation was material and relevant, and it was for the jury to  
 pass upon the facts.

Plaintiff's offered evidence tending to show that at the  
 time the machine was delivered to defendant a one-half horse-power  
 motor was attached thereto; that the power furnished by this motor  
 was insufficient and was the cause of the failure of the machine to  
 do the work as provided by the contract; that plaintiff thereupon  
 purchased and delivered a three horse-power motor with a speed re-  
 ducer, and that when this was attached the machine functioned  
 properly. It is urged that this evidence was inadmissible upon  
 the theory that it varied the terms of the written contract. The  
 contract said nothing whatever about what kind of motor should be  
 attached to the machine, and the transaction with reference to the  
 substitution of motors occurred long after the execution of the  
 contract and after the machine was delivered. The admission of  
 this evidence did not violate the rule against receiving parol  
 evidence to vary the terms of the written contract, since the  
 transaction was not prior to or contemporaneous with the making



of the contract.

The controlling question in the case is raised by the defendant's first point (which we consider last), namely, that the verdict of the jury is contrary to the manifest weight of the evidence. Many cases are cited in the brief to the effect that it is the duty of this court to reverse a judgment based upon such a verdict. There is no doubt that this is the rule. Here, the evidence shows that this machine was constructed according to the terms of a written contract; that it was delivered to defendant and used by it for some considerable time. The terms of the contract called for a "postal card gathering machine to consist of five units," which when completed was "to be fully capable of gathering thirty (3) different postal cards or similar matter, so that operators engaged at the end of the delivery chain of this machine may be able to pick up units consisting of thirty (30) cards or similar matter and insert them in envelopes for mailing." The written contract further provided that the machine was to have a speed of 50 R. P. M., and that the feed was to be so constructed that only one card, or similar matter, would come out at a time; that the double chain was to be so arranged and timed that a card, or similar matter, coming out of the first feed box would, by the time it reached the last feed box, have a full assortment of 30 cards, or similar matter, <sup>one</sup> from each feed box.

The contract recited that it was the intention to construct the machine in a manner based upon "a crude model" made by plaintiffs, but that it was made a condition that this model was merely a suggestion and not to be construed as binding defendant in any way. The contract stated:

"You are to construct a machine that will do the work we intend to get from it, viz.: to gather thirty (30) post cards or similar matter at the speed mentioned, and in a manner stated above. This will doubtless necessitate a large number of changes in the

of the contract.

The controlling question in the case is raised by the defendant's first plea (which is considered last), namely, that the

verdict of the jury is contrary to the manifest weight of the

evidence. Many cases are cited in the brief to the effect that

it is the duty of this court to reverse a judgment based upon such

a verdict. There is no doubt that this is the rule. Here, the

evidence shows that the machine was constructed according to the

terms of a written contract; that it was delivered to defendant and

that it is for use as a printing press. The terms of the contract

called for a "certain kind of printing machine to consist of five

units," which was constructed and is in full compliance of the

contract (5) different parts of similar matter, as that of the

parts engaged at the end of the delivery chain of this machine may

be able to give up units consisting of thirty (30) units or similar

matter and insert them in evidence for similar." The written con-

tract further provided that the machine was to have a speed of 30

R. P. M., and that the feed was to be so constructed that only one

unit, or similar matter, would come out at a time; that the machine

chain was to be so arranged and timed that a card, or similar mat-

ter, coming out of the first feed box would, at the time it reached

the last feed box, have a full movement of 30 units, or similar

one

matter, from each feed box.

The contract recited that it was the intention to construct

the machine in a manner based upon "a certain model" made by plain-

tiff, but that it was made a condition that this model was merely

a suggestion and not to be construed as binding defendant in any

way. The contract recited

"Let it be understood a machine that will do the work as  
intended is not provided; to rather thirty (30) parts each of  
similar matter as the model mentioned, and in a manner stated above.  
The machine shall be constructed a large number of changes in the

Benjamin Ritholz, secretary of defendant corporation and also a lawyer, drew this contract with suggestions from F. Backstrom. Defendant produced many witnesses, for the most part its own employees, who testified to facts tending to show that the machine did not fulfill the requirements above stated. The testimony of F. Backstrom, who had charge of the matter for plaintiffs, was to the effect, as already stated, that when the machine was first delivered a one-half horse-power motor was attached <sup>not</sup> which was/sufficient, and that when the three horse-power which he supplied was attached with a speed reducer the machine worked in such a way as to comply with all the requirements of the contract. He testifies in substance that the machine was declared to be satisfactory; that he was promised payment by Ritholz, and that it was only after frequent requests for the purchase price, and as late as February of the following year, that the defense was raised which was interposed at the trial. He is corroborated by the testimony of John Condon, at the time of the trial employed as manager of the multigraph department of Sears, Roebuck & Company, and who had worked for defendant from September 30, 1926, to November 15, 1928, when he left its employment.

Condon says that when the machine was delivered he was put in charge of it by Ben Ritholz; that when the switch was turned on the machine would not run; that it was impossible to run it with the motor that was hooked up with it; that they (Backstrom, William Deckert and the witness) dismantled the machine to see whether there was anything wrong with the motor, or whether any part was binding; that they found that the parts moved freely and decided to put a three horse-power motor on the machine; that this was done and a speed reducer put on; that the machine ran and that the result of the tests was entirely satisfactory; that the machine was run approximately two months until the work of the season was completed.



Benjamin Nichols, secretary of defendant corporation and  
also a lawyer, from this contact with suggestions from  
... ..  
its own employees, who testified in facts tending to show that the  
machine did not fulfill the requirements above stated. The tes-  
timony of W. Bachman, who had charge of the matter for plain-  
tiff, was to the effect, as already stated, that when the machine  
was first delivered a one-half horse-power motor was attached  
which was <sup>not</sup> sufficient, and that when the three horse-power which he  
supplied was attached with a speed reducer the machine worked in  
such a way as to comply with all the requirements of the contract.  
He testified in substance that the machine was declared to be  
satisfactory; that he was promised payment by Nichols, and that  
it was only after frequent requests for the purchase price, and on  
late in February of the following year, that the defense was  
raised which was introduced at the trial. He is corroborated by  
the testimony of John Gordon, at the time of the trial employed  
as manager of the milligraph department of Sears, Roebuck & Com-  
pany, and who had worked for defendant from September 20, 1926, to  
November 12, 1927, when he left the employment.  
Gordon says that when the machine was delivered he was put  
in charge of it by Ben Nichols; that when the action was turned on  
the machine would not run; that it was impossible to run it with  
the motor that was hooked up with it; that they (Bachman, William  
Docket and the witness) demanded the machine to see whether  
there was anything wrong with the motor, or whether any part was  
missing; that they found that the parts moved freely and decided to  
put a three horse-power motor on the machine; that with this new  
a speed reducer put on; that the machine ran and that the result  
of the tests was entirely satisfactory; that the machine was run  
regularly about two months until the work of the season was completed.

William Deekert (who at the time of the trial was in business for himself but who in September, 1928, was employed by defendant and had worked for it or for persons associated with it for nearly eight years) testified that in the fall of 1928 he was foreman of defendant and took care of all the manufacturing machinery and mechanical work, and that with a little help from Condon he made the model which was furnished by defendant and by which the machine was constructed. He corroborated F. Backstrom with reference to the substitution of a three horse-power motor for the one-half horse-power motor, and said that the use of the one-half horse-power motor was a mistake; that when he found the one-half horse-power motor would not work he called Backstrom on the 'phone and that Backstrom came to defendant's place and put on the 3 H. P. motor with a speed reducer, after which the machine ran and was operated, he thought, about five days after delivery. He also said that the motor was temporarily connected with an old wire lying there so that it was not possible to get out the 30 A. P. M.; that the electric line was overloaded and could not give the power needed; that when sufficient power was furnished the machine would make from 50 to 52 revolutions per minute. He saw Condon run the machine for about two months, and he noticed Novak running the machine after Condon left.

On the other hand, Frank Deekert, who describes himself as a toolmaker, and Novak testify that there were all kinds of trouble with the machine. He says, "Sometimes it was working; sometimes they got cards out of there. Sometimes they did not get any at all. Sometimes a half a dozen in one. I knew that the machine was supposed to knock out thirty cards at one time. It did not knock out thirty cards, not all the time." His testimony as to the precise time, which was important, was quite indefinite.

Mrs. May Barry, who was in September, 1928, an employee of the defendant company in charge of the girls who worked there,

William Doherty (who at the time of the trial was in prison for himself but who in September, 1934, was employed by defendant and had worked for it on various occasions with it for nearly eight years) testified that in the fall of 1933 he was foreman of defendant and took care of all the manufacturing machinery and mechanical work, and that with a little help from London he made the model which was furnished to defendant and by which the machine was constructed. He remembered a discussion with defendant as to the construction of a motor which would make the low speed motor never motor, and said that the use of the one-half horse-power motor was a mistake; that when he found the one-half horse-power motor would not work he called attention to the 'phone and that attention came to defendant's place and out on the 3 M. V. motor with a speed reducer, after which the machine ran and was operated, he thought, about five days after delivery. He also said that the motor was temporarily connected with an old wire lying there so that it was not possible to get out the 3 M. V. that the electric line was overextended and could not give the power needed; that when sufficient power was furnished the machine would make from 50 to 55 revolutions per minute. He saw London run the machine for about two months, and he noticed some turning the machine after London left. He saw some other, Frank Smith, who described himself as a toolmaker, and Frank testified that there were all kinds of trouble with the machine. He says, "Sometimes it was working; sometimes they got cards out of there. Sometimes they did not get any at all. Sometimes a half a dozen in one. I know that the machine was supposed to knock out thirty cards at one time. It did not knock out thirty cards, not all the time." His testimony as to the precise time when the machine was important, was quite indefinite.

Mr. Ray Harry, who was in September, 1934, an employee of the defendant company in charge of the girls who worked there,



out testified that the cards never came right from the machine; sometimes there would be thirteen cards to a set, sometimes thirty, sometimes forty, and sometimes they would all come and bunch up on the belt so they could not be used; that she reported to Kovak that the machine was out of order but they did not pay any attention to what Kovak did about it. She says they worked on the machine and it would not go; that they had to hire 75 girls to do the work by hand, and that the machine was allowed to stand idle. She had talked the case over with Ritholz, and she said he told her that all she had to do was to tell the truth. Some eight or nine girls employed at the place gave similar testimony, which we shall not undertake to discuss in detail.

Benjamin Ritholz testified contradicting the testimony of Backstrom at every point. He identified alleged copies of letters which his stenographer testified she sent on September 15, October 2 and October 12, 1928, in substance informing plaintiffs that the machine was wholly unsatisfactory. Letters dated February 4, March 7, and September 14, 1929, Backstrom said were received, but denied that the other letters were ever received by plaintiffs.

Without discussing all the evidence in detail, it may be summed up by saying that several witnesses must have testified either falsely or without knowledge. Defendant argues that the preponderance of the evidence is in its favor because it called a larger number of witnesses. We have, however, often stated that this court does not count evidence but weighs it. As a matter of fact, Condon and William Deckert were two witnesses who were apparently financially disinterested and who had complete knowledge of what transpired. If the testimony of Ritholz is true (lawyer as he was) it seems highly probable that upon rejecting the machine in September (if he did reject it) he would have done so in a manner that could have left no doubt of the fact. The evidence here tends

out

testified that the same were not taken from the machine; that  
lines there would be fifteen yards or a net, sometimes thirty,  
sometimes forty, and sometimes they would all come and bunch up on  
the belt so they could not be used; and she reported to Haver that  
the machine was out of order but they did not pay any attention  
to what Haver said about it. She says they worked on the machine  
and it would not go; that they had to hire 75 girls to do the work  
by hand, and that the machine was allowed to stand idle. She had  
taken the case over with Altholz, and she said he told her that  
all she had to do was to tell the girls. Some eight or nine girls  
employed at the place gave similar testimony, which we shall not  
undertake to discuss in detail.

Benjamin Altholz testified contradicting the testimony of  
Hackett at every point. He identified alleged copies of letters  
which his newspaper published the week of September 15, October  
2 and October 19, 1934, in substance informing Altholz that the  
machine was really unworkable. Letters dated February 1, 1935,  
7, and September 12, 1935, Hackett said were received, but he said  
that the other letters were not received by Altholz.

Without discussing all the evidence in detail, it may be  
summed up by saying that several witnesses have testified either  
themselves or without knowledge. Defendant argues that the probative  
value of the evidence is in its favor because it called a larger  
number of witnesses. We have, however, often stated that this  
court does not count evidence but weighs it. As a matter of fact,  
Condon and William Hackett were two witnesses who were apparently  
financially disinterested and who had complete knowledge of what  
transpired. If the testimony of Altholz is true (whether or not we  
it even slightly probable that some evidence was missing in  
September (if we did reject it) we would have done so in a manner  
that could have left no doubt of the fact. The witness here says

to show that the machine was not finally rejected until after the end of the season for the work it was intended to perform. If the machine would not do the work for which it was designed there should have been an unqualified rejection of it within a reasonable time. Apparently the jury was convinced that the witnesses for plaintiff's gave an accurate account of the transaction. We have neither seen nor heard the witnesses and are not persuaded that we should reject the verdict which the jury returned and the trial court approved.

The judgment is affirmed.

AFFIRMED.

O'Connor and McMurely, JJ., concur.



to show that the machine was not finally rejected until after the  
end of the season for the work it was intended to perform. If the  
machine would not do the work for which it was designed there should  
have been an immediate rejection of it within a reasonable time.  
Apparently the jury was convinced that the witness for plaintiff's  
case was a credible witness of the transaction. It was within their  
power to hear the witness and are not persuaded that we should reject  
the verdict which the jury returned and the trial court approved.

The judgment is affirmed.

Witness

W. Connor and Son, Inc., Chicago, Ill.

37022

DANIEL L. MADDEN and  
EDWARD J. KELLEY,  
Appellees,

vs.

SARAH L. JOHNSON,  
Appellant.

59 7  
APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

274 I.A. 661<sup>3</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

This cause was before this court on a former appeal.

Madden v. Johnson, 257 Ill. App. 638. The original bill was filed in the Superior court January 27, 1928, by Madden and Kelley for the purpose of securing their rights in a contract with defendant Sarah Johnson, under which they performed valuable services in her behalf in prosecuting an action in equity in that court and in defending in the Supreme court a decree which was obtained in favor of Mrs. Johnson in the trial court. Johnson v. Bernard, 323 Ill. 927. The services were not denied, but Mrs. Johnson filed a cross-bill, in which she set up that a written contract with complainants executed by her on August 17, 1926, was presumptively fraudulent and prayed that the same might be set aside, she offering to pay to complainants a reasonable fee. The cause was put at issue as to both bill and cross-bill, the evidence taken by the chancellor, and on June 26, 1929, a decree was entered (finding that the equities were with defendant), setting aside the contract upon condition that defendant pay in addition to certain costs and expenses the sum of \$2500 for solicitors' fees and dismissing complainants' bill for want of equity. Complainants appealed to this court, where after a review of all the evidence the decree was reversed and the cause remanded.

In the opinion we stated:

WILLIAM A. BAKER  
JAMES A. BAKER  
JAMES A. BAKER

WILLIAM A. BAKER

BY COURT ORDER

27411.001

WILLIAM A. BAKER  
JAMES A. BAKER  
JAMES A. BAKER

This court has before this court on a former record.

William A. Baker, 27411.001. The original bill was

filed in the Superior Court January 27, 1928, by William A. Baker and James

for the purpose of securing their rights in a contract with the

James A. Baker, which was a contract with the

which in that respect in proceeding an action in equity in that

court and is referred to the Superior Court a former record was

obtained in favor of the James A. Baker in the trial court. William A.

Baker, 27411.001. The services were not denied, but the

James A. Baker, in which the bill was filed a witness

contract with James A. Baker executed by him on January 27, 1928, was

presumptively true and correct and the same might be set

aside, and offering to pay to James A. Baker the sum of

James was put at issue as to both bill and cross-bill. The evidence

taken by the Chancellor, and on June 20, 1928, a decree was entered

(finding that the evidence was in favor of the James A. Baker, and the

contract was annulled and returned to the James A. Baker in certain

costs and expenses the sum of \$2500 for solicitor's fees and dis-

charging James A. Baker's bill for want of equity. Decisions are

referred to this court, where after a review of all the evidence the

James was returned and the same returned.

In the opinion of the court



"The case of cross-complainant against Zander and others was practically created through the services rendered by her solicitors. They performed these services upon the contingency that their labors would be without compensation unless they succeeded in getting back the property which cross-complainant conveyed to Bernard. It is apparent that if the market value of the real estate had decreased instead of increased this controversy would never have arisen.

"Cross-defendants are entitled to receive as compensation for their services, in conformity with the agreement between the parties, one-third of the real estate recovered or the equivalent of its value in money, less \$3,800. That that amount is cannot be satisfactorily determined from this record. For that reason the decree is reversed and the cause remanded with directions for further proceedings in conformity with the views herein expressed."

Mrs. Johnson petitioned the Supreme court for certiorari, which was denied.

The cause was redecided in the Superior court and the chancellor heard evidence as to the value of the real estate recovered in the suit conducted for her by complainants, and April 20, 1933, entered a decree finding that there was a valid contract under which complainants were entitled to recover one-third of the fair cash value of the property recovered in excess of \$3200; that for the purpose of arriving at an equitable adjustment Madden and Kelley had offered to pay \$3200 to Mrs. Johnson upon receiving a deed to a one-third interest in the property, but that she had absolutely refused to accept the arrangement; that complainants were entitled to a lien upon the premises for the amount of the fees due to them; that the value of the property recovered in the suit in the Superior court of Cook county, which was affirmed by the Supreme court at the time of the recovery thereof, was \$50,000; that complainants were entitled to one-third of this sum, less \$3200, making a total sum due of \$13,600; that complainants were entitled to payment of that sum, or in lieu thereof to a one-third interest in the land, subject to one-third of \$3200, or the sum of \$1066.67. It was therefore ordered and adjudged that defendant pay to complainants that sum, or convey a one-third interest of the property, subject to the payment of \$1066.67 within





ten days from the entry of the decree; that in default of the execution of such deed, or of the making of such payment, the property should be sold by a master subject to defendant's right of redemption. The decree recites other material facts in detail.

The only evidence in the transcript is that taken by the chancellor upon the question of the value of the premises. From the decree of April 20th Mrs. Johnson prayed and was allowed an appeal to the Appellate court upon filing bond in the sum of \$1000 within thirty days to be approved by the court.

April 23, 1933, defendant moved that the decree of April 20th "be vacated, changed and modified," and that the time specified in the decree within which defendant should pay the amount found due with interest thereon or convey to complainants her one-third interest should be extended. This motion was continued from time to time, and on June 7, 1933, an "amended decree" was entered by the court which the record recites to be "on motion of defendant and cross-complainants." From this amended decree (which also recites the facts in detail) finding the sum due to be \$15,600 and directing sale in case of default in payment or the execution of the deed, defendant likewise prayed and was allowed an appeal to this court upon filing her bond within thirty days. The bond was filed and, as a matter of fact, recites the entry of the decree on April 20th, "from which decree and amended decree of the said Superior court of Cook County the said Sarah L. Johnson has prayed for and obtained an appeal to the Appellate Court within and for the First District in said state." The bond goes on to say that if defendant shall duly prosecute her "said appeal with effect," etc., the obligation shall be void, otherwise to remain in full force and effect.

Complainants argue that defendant may not prosecute an appeal from a decree which was entered on her own motion, and this



for the time being the entry of the house; that in default of the  
completion of such work, or of the making of such payment, the  
property should be sold by a trustee subject to defendant's right  
of redemption. The house retains other material facts in detail.  
The only evidence in the transcript is that given by the  
deponent upon the question of the value of the premises. From  
the house of April 1900 Mrs. Johnson moved and was allowed an  
apartment in the apartment house upon filing suit in the sum of  
\$1000 which money was to be returned by the court.  
The deponent states that the house at 1211  
East "B" Street, Chicago and vicinity, and that the time spent  
there in the house with defendant's family was very  
long. The wife's interest in the house is maintained by  
one-third interest should be returned. This matter was discussed  
from time to time, and on June 7, 1907, an "amended decree" was  
entered by the court which the record reflects to be "an action of  
specific performance and quiet title." From this amended decree (which  
also reflects the facts in detail) stating the case as it is, the  
and dividing said in case of default in payment on the condition  
of the deed, defendant's interest proper and was allowed an appeal to  
this court upon filing and good and valid title. The house was  
filed and, as a matter of fact, reflects the entry of the house  
on April 1900, "from which house and material facts of the said  
deponent's account of such entry the said Sarah L. Johnson has moved  
and obtained an appeal to the appellate court which and for  
the wife's interest in said house." The house goes on to say that  
it reflects the facts in detail which were filed in the court,  
etc., the opinion shall be void, executed as to be in full  
force and effect.

Witness my hand and seal of office this 10th day of January, 1908.

contention is not without plausibility. However, we prefer to put our decision of the appeal upon other grounds.

Defendant argues for reversal (citing many authorities) that the final decree is erroneous in granting a lien on the property described in the bill because it is not supported by allegations of fact; that a complainant must recover on the case made by his bill, and that mere conclusions of the pleader will not support a decree; that at common law an attorney does not have a lien upon the property recovered in a suit conducted by him; that an attorney's lien does not arise under the Attorneys' Lien act without the service of the notice therein prescribed; that a decree cannot rest on the prayer alone; that the contract does not create a specific lien; that the final decree is erroneous in finding that complainants are entitled to an interest in the property described in the bill of complaint; that the alleged contract does not belong to the class of contracts which are specifically enforced in equity.

All these points are argued at length with numerous citations of authorities, but none of them was presented for consideration upon the former appeal, and all of them might have been presented at that time. This court and the Supreme court have many times held in substance that upon the second appeal of a case, either to this court or to the Supreme court, the judgment of the court rendered on the first appeal is res adjudicata as to all persons who were parties to the proceeding, not only as to questions actually decided but as to all questions which might have been decided, if properly presented, as was said in Davis v. Bunkle Admr., 140 Ill. App. 171:

"There the parties, the issues and the evidence are substantially the same, 'the decision upon one appeal is res adjudicata upon a second appeal in the same case notwithstanding additional assignments of error may be made raising upon the second appeal questions which were not raised upon the first.'"

any of them are, however, available in the public domain.

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[illegible]

1. The first question is whether the evidence is sufficient to establish that the defendant was in the car at the time of the shooting. The evidence is that the defendant was seen in the car at the time of the shooting. The evidence is that the defendant was seen in the car at the time of the shooting.

[illegible]



Further authorities to the same effect are Paonia v. Griesbach, 127 Ill. App. 462; Walker v. Montgomery, 156 Ill. App. 96; Moshier v. Horton, 100 Ill. 63; Newberry v. Blatchford, 106 Ill. 584; Tabach, St. L. & Pac. Ry. Co. v. Paterson, 115 Ill. 597; Mayh v. Reff, 123 Ill. 310; Bilworth v. Curtis, 139 Ill. 508; Test vs. Douglas, 145 Ill. 164; Henning v. Eldridge, 146 Ill. 306; Union Mutual Life Ins. Co. v. Hirschoff, 149 Ill. 536; Windett v. Ruggles, 151 Ill. 184; Keokuk & Hamilton Bridge Co. v. People, 185 Ill. 276; Muren Coal & Ice Co. v. Howell, 217 Ill. 190; Bariner v. Ingraham, 230 Ill. 130; Jackson v. Glos, 249 Ill. 388.

As a matter of fact, after the cause was reheard in the trial court, no amendment to the pleadings was made, and the only evidence taken was directed toward the issue as to the value of the property at the time it was recovered. This is the only evidence preserved in the record. It is urged that the evidence does not sustain the finding of the decree in this respect, and this is the only error assigned and argued which we regard as open to our consideration. The finding is that the property in question was of the value of \$50,000, and there is expert evidence which sustains the finding. As a matter of fact, complainants have assigned gross-errors on this finding of the decree. Mrs. Johnson in her sworn answer placed the value of the property at \$150,000, - a value which tends to very much discredit the opinions of some of her experts. The question in this court on this point is whether the finding of the decree is clearly and manifestly erroneous. The chancellor saw the expert witnesses and heard them testify. We are not disposed to substitute our judgment for his.

The decree is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.



37053

THE LOMAX COMPANY, a Delaware Corporation,  
and THE GREEN LANTERN BEVERAGE COMPANY,  
an Illinois Corporation,

Appellees,

vs.

LOMAX BROS. BEVERAGES, INC., a Corporation,  
FRANK E. LOMAX, Individually and doing  
business as FRANK E. LOMAX COMPANY, J. A.  
LOMAX, THE GREAT WESTERN BOTTLING COMPANY,  
a Corporation, HELMAR SWENLUND, C. R.  
BENKLEY, LUCILLE SCHAUER, HARRY LEAGHARD,  
HOWARD R. ROBERTS, JOHN J. McMAHON, EDWARD  
J. HUGHES, as Secretary of State; and LOMAX  
COMPANY, an Illinois Corporation,  
Appellants.

APPEAL FROM SUPERIOR  
COURT OF COOK COUNTY.

274 I.A. 661<sup>d</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

Complainant corporations on November 28, 1932, filed their bill in chancery against defendants, setting up in detail facts tending to show unfair competition, and praying for a temporary injunction pending the hearing and that a decree for a permanent injunction, an accounting and other relief might be granted. A temporary injunction issued as prayed. Defendants appeared and answered the bill. The cause was put at issue and referred to a master who filed his report finding that the equities were with complainants and the facts averred in the bill true. To this report defendants filed objections which upon the hearing before the chancellor stood as exceptions. The exceptions were overruled, and June 28, 1933, a decree was entered in conformity with the recommendations of the master. This appeal has been perfected from that decree. The bill alleges and the master's report and the decree find the facts in substance as follows:

The business complainants conduct at Chicago was founded by John D. Lomax, the grandfather of defendants Frank E., William L. and J. A. Lomax, in 1851, and was thereafter continued under the name of John A. Lomax & Son until about 1887. John A. Lomax &



THE LOMAX COMPANY, a Delaware Corporation,  
and THE CHINA LAMBERT COMPANY,  
an Illinois Corporation,  
Appellants,

vs.

LOMA LUMBER COMPANY, INC., a corporation,  
LEWIS H. LOMAX, Individually and as  
Partner in LOMAX & LUMBER COMPANY, L.  
LOMA, and JOHN LOMAX, Individually and  
as Partners in LOMAX & LUMBER COMPANY,  
Appellees.

MR. PRESIDING JUSTICE RATCHETT  
DELIVERED THE OPINION OF THE COURT.

Complaints were filed on November 22, 1932, filed their

bill in chancery against defendants, setting up in detail facts  
tending to show unfair competition, and praying for a permanent  
injunction forbidding the hearing and that a decree be entered for a permanent  
injunction, an accounting and other relief might be granted. A  
temporary injunction issued on prayer. Defendants appeared and  
answered the bill. The cause was put at issue and returned to a  
master who filed his report finding that the equities were with  
complainants and the facts averred in the bill true. To this re-  
port defendants filed objections which upon the hearing before the  
chancellor stood as exceptions. The exceptions were overruled, and  
June 28, 1933, a decree was entered in conformity with the recom-  
mendations of the master. This appeal has been docketed from that  
decree. The bill alleges and the master's report and the decree  
find the facts in substance as follows:

The business of defendant in Chicago was founded by  
John J. Lomax, the grandfather of defendant Frank M. Lomax, Jr.,  
and J. L. Lomax, in 1811, and was thereafter continued under the  
name of John A. Lomax & Son until about 1887. John A. Lomax &

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Son was succeeded by the Chicago Consolidated Bottling Co., which conducted the same business, namely, that of manufacturing and selling non-alcoholic beverages, etc. The Consolidated Bottling Co. sold out the business to The Lomax Co. of Maine. The premises used by the Consolidated Bottling Co. were owned by George Lomax and rented from him. Thereafter The Lomax Co. of Maine bought these premises from George Lomax. At that time George Lomax, J.A. Lomax and W. L. Lomax were officers and directors of the Maine company. Subsequently, all the members of the Lomax family except J. A. Lomax severed their connection with this Lomax Co. of Maine. In January, 1924, the Maine company entered into a contract with the Indian Hill Co., a corporation, whereby it was given the right to use the trademark "Indian Hill" and certain formula rights belonging to that company, and later the Maine company purchased all the outstanding stock of the Indian Hill Co. Thereafter The Lomax Co., a corporation, was organized under the laws of the state of Delaware. In February, 1931, the Delaware company purchased all the assets of The Lomax Co. of Maine except its real estate and machinery, and the Maine company changed its name to The Paulina-Minzie Corporation. At that time J. A. Lomax was the president of The Paulina-Minzie Corporation and vice-president of The Lomax Co. of Delaware. In August, 1932, the Delaware corporation executed its chattel mortgage covering all of its property, including trade names and trademarks, to one Ada R. Bronson to secure an indebtedness of \$5,346.07 to J. F. Jones and an indebtedness of \$3,000 to Charles G. Palmer. About August 5, 1932, complainant, the Green Lantern Beverage Co., bought the trademarks, trade names, etc., of the Delaware corporation for \$2,000 subject to release by Ada R. Bronson of her interest therein. The chattel mortgage was foreclosed, and J. G. Jollicœur purchased the property for \$11,100 and thereafter sold the same to complainant Green Lantern Beverage

was organized by the United States National Bank Co., which  
continued the same business, namely, that of manufacturing and  
selling one-half size buttons, and the United States National  
Co. sold out the business to The Loman Co. of Maine. The business  
used by the United States National Co. were owned by George Loman  
and rented from him. Thereafter the Loman Co. of Maine bought  
these premises from George Loman. At that time George Loman, J.A.  
Loman and J. A. Loman were officers and directors of the Maine  
company. Subsequently, all the members of the Loman family except  
J. A. Loman severed their connection with this Loman Co. of Maine.  
In January, 1924, the Maine company entered into a contract with  
the Indian Hill Co., a corporation, whereby it was given the right  
to use the trademark "Indian Hill" and certain formula rights be-  
longing to that company, and later the Maine company purchased all  
the outstanding stock of the Indian Hill Co. Thereafter the Loman  
Co., a corporation, was organized under the laws of the state of  
Maine. In February, 1925, the Maine company purchased all  
the assets of the Loman Co. of Maine except the real estate and  
inventory, and the Maine company changed its name to The Maine  
Kinetic Corporation. At that time J. A. Loman was the president of  
The Maine Kinetic Corporation and vice-president of the Loman Co.  
of Maine. In August, 1927, the Maine Kinetic Corporation  
its chattel mortgage covering all of its property, including trade  
names and trademarks, to and for A. B. Swanson to secure an indebted-  
ness of \$5,000.00 to J. V. Jones and an indebtedness of \$5,000.00 to  
Charles A. Loman. About August 8, 1928, approximately, the Green  
Lumber Company was formed by the Loman family, and the same day  
the Maine Kinetic Corporation for \$5,000.00 was sold to the Green  
Lumber Company of New England. The Maine Kinetic Corporation was there-  
after, and J. A. Loman received the proceeds of the sale, \$10,000.  
The Loman Co. of Maine was organized under the laws of the state of



Co., whereby it became vested with the right to use all the trademarks, trade names and formulas formerly owned by John Lomax. The predecessors of the Green Lantern Co. at various times registered certain trademarks. The Green Lantern Co. and its predecessors have continuously employed the word "Lomax" on certain of its labels. About November 17, 1931, The Lomax Co. of Delaware registered its trademark with the Secretary of the State of Illinois, using the arbitrary word "Lomax." About April 11, 1931, The Lomax Co. of Delaware registered its trademark with the Commissioner of Patents of the United States for "Old Tom Lime Rickey." The predecessors of the Green Lantern Beverage Co. have used the words "Lomax Company" and the word "Lomax" became associated thereby in the minds of the public with the products of The Lomax Co. The use of the word "Lomax" became vested in The Lomax Co. of Delaware and the Green Lantern Beverage Co. A large and profitable business was built up. The Lomax Co. of Delaware was authorized to do business in Illinois February 14, 1931, and Jay Fleming Jones was the president of that company and the owner of the common stock of the corporation. J. A. Lomax, defendant, was connected with this business for many years, and after the death of Jones January 1, 1932, he became the principal managing head in charge of the company. A dispute thereafter arose in which J. A. Lomax was ousted from The Lomax Co., and thereafter, together with his brothers, he formed the Lomax Bros. Beverages, Inc., and also bought the stock of the Great Western Bottling Co. He is now in charge of the sales department of Lomax Bros. Beverages, Inc., and that corporation is engaged in the business of manufacturing and selling ginger ale and other beverages under labels containing the name "Lomax Bros." Various former employees of The Lomax Co. of Delaware solicited by defendants are now employed by Lomax Bros. Beverages, Inc., and the business of that corporation competes directly with complainants.

Co., whereby it became vested with the right to use all the trade-  
marks, trade names and formulas formerly owned by John Loman. The  
assignment of the same business to the Loman Co. of Chicago, Illinois  
certainly is correct. The Green Loman Co. and its predecessors  
have continuously employed the word "Loman" on certain of its labels  
about November 17, 1901, the Loman Co. of Chicago registered the  
trademark with the Secretary of the State of Illinois, using the  
arbitrary word "Loman". About April 11, 1901, the Loman Co. of  
Chicago registered the trademark with the Commissioner of Patents  
of the United States for "old Tom like whiskey". The predecessors  
of the Green Loman Beverage Co. have used the words "Loman Bev-  
erage" and the word "Loman" because associated thereby in the minds  
of the public with the products of the Loman Co. The use of the  
word "Loman" became vested in the Loman Co. of Chicago and the  
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built up. The Loman Co. of Chicago was authorized to do business  
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dent of that company and the owner of the common stock of the com-  
pany. L. A. Loman, defendant, was connected with this business  
for many years, and after the death of James Loman, 1902, he  
became the principal managing head in charge of the company. A  
dispute thereafter arose in which L. A. Loman was ousted from the  
Loman Co., and thereafter, together with his brothers, he formed  
the Loman Food Beverage Co., and also bought the stock of the  
Green Loman Beverage Co. as it was in charge of the same com-  
pany at Loman Food Beverage Co., and that corporation in ex-  
posed in the business of manufacturing and selling ginger ale and  
other beverages were labels containing the word "Loman".  
Various former employees of the Loman Co. of Chicago solicited  
the business of the Loman Food Beverage Co., and



Shortly after the death of Jay Fleming Jones, president of The Lomax Co., J. A. Lomax organized a company known as Brinks, Inc., and used the office formerly occupied by Jones in connection with it. By reason of this organization business was diverted from The Lomax Co. of Delaware to that of Brinks, Inc. Brinks, Inc. continued to use the premises of the Delaware company for the conduct of business and the directors of that company instructed J. A. Lomax to remove Brinks, Inc., from the premises. December 10, 1932, defendants filed with the Secretary of State of Illinois an application for the incorporation of a company to be known as The Lomax Co. for the purpose of manufacturing and selling beverages. January 20, 1933, the Secretary of State of Illinois issued a certificate of incorporation to that company. The Delaware corporation failed to pay its franchise tax which was due July 1, 1932, and for this reason its license to do business in Illinois was revoked. Defendants knew this fact and thereupon applied to the Secretary of State to be incorporated under that name, and a certificate of incorporation was issued to them. Subsequently the Delaware company paid its franchise tax and penalties and was restored to good standing. This action by defendants for the incorporation of a company to use the word "Lomax" was in furtherance of their plan to appropriate the business of complainants.

The master's report also finds that a statement on the label used by The Lomax Co. of Delaware and its predecessors that Lomax Pepsin Ginger Ale is made from pure Jamaica ginger combined with pepsin and aromatics is untrue, since pepsin is not used as an ingredient but pure Jamaica ginger root in small quantities was used instead; and other similar statements upon its labels were not true; that these misdescriptions of ingredients were not made for the purpose of deceiving the public and that the public who purchased the beverages relied upon the word "Lomax" rather than



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Lemon Co., J. A. Jones organized a company known as Brinks, Inc.,  
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it. By reason of this organization business was diverted from  
the Lemon Co. of Delaware to that of Brinks, Inc. Brinks, Inc.  
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conduct of business and the directors of that company instructed  
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an application for the incorporation of a company to be known as  
The Lemon Co. for the purpose of manufacturing and selling bever-  
ages. January 20, 1933, the secretary of state of Illinois issued a  
certificate of incorporation to that company. The Delaware corpo-  
ration failed to pay its franchise tax which was due July 1, 1933, and  
for this reason its license to do business in Illinois was revoked.  
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corporation was issued to them. Subsequently the Delaware company  
paid its franchise tax and penalties and was restored to good stand-  
ing. This action by defendants for the incorporation of a company  
to use the word "Lemon" was in furtherance of their plan to ap-  
propriate the business of complainants.  
The master's report also finds that a statement on the label  
used by The Lemon Co. of Delaware and its predecessors that Lemon  
Fruit Glaze is made from pure Lemon Glaze complied with  
regulation and was not in violation, which means it was not an in-  
fringement nor was Lemon Glaze used in such quantities as to  
mislead; and other similar statements upon the labels were not  
true; that these misstatements of ingredients were not made for  
the purpose of deceiving the public and that the public was not  
deceived the beverages called upon the word "Lemon" rather than

upon the descriptive matter following the name of the beverage; that the public was not deceived nor were complainants guilty of any fraud which would vitiate or nullify their right to use the word "Lomax;" that the word "Lomax" as connected with the use of ginger ale and other beverages manufactured by the Delaware company and its predecessors was a valuable asset; that the use of the word "Lomax" by defendants either in connection with the words "Lomax Bros." or "Lomax Bros. Beverages, Inc.," is an infringement of the <sup>and</sup> proprietary rights of complainants will result in deceiving the public as to the manufacturers of the beverages purchased by them and will create the belief in the minds of the public that the products sold by Lomax Bros. Beverages, Inc., is that of complainants; that such use of the word "Lomax" by defendants would result in financial loss to complainants; that the acts of defendants in soliciting customers of complainants and hiring salesmen, drivers and stenographer would tend to destroy the business of complainants and were acts of unfair practice; that the continuation of the use of the word "Lomax" by defendants would cause irreparable damage; that therefore the temporary injunction theretofore issued by the court should be made permanent.

The decree finds that certain citations for contempt against defendants for violation of the temporary injunction should be dismissed; that complainants were not barred by unclean hands, for the reason that there was no fraud upon the public. Defendants were therefore perpetually and permanently enjoined from using in connection with the business of manufacturing ginger ale, non-alcoholic beverages and beverages of every description, the name "Lomax" or the arbitrary word "Lomax," or the name "Lomax" either alone or in combination in corporate names or in advertisements, etc., or the names "Lomax Bros.," "Lomax Bros. Beverages, Inc.," "Lomax Company," "Lomax Company of Illinois;" from infringing on the trademark "Lomax"





registered with the Secretary of the State of Illinois; from using the secret formulas of manufacture of products by complainants; from solicitation for and sale of said products under the name and style "Lomax"; from in any manner interfering with the business, including the trademark and patent rights, labels, trade name and good will of complainants; from holding out or representing that they are the representatives of or in any way connected with complainants; from operating in connection with the manufacture and sale of said products under any name and style whereby they use the word "Lomax" in its secondary meaning in connection with the business of complainants; from simulating the signs and color schemes adopted by complainants and used in connection with their business, wherein the arbitrary word "Lomax" is displayed, and from simulating the appearance, construction, color scheme and design of complainants' automobile trucks or salesman cars and the signs thereon by the use of the arbitrary word "Lomax."

Defendants contend that the decree should be reversed in the first place, because it interferes with the absolute right, which every person has, to use his own name honestly in his own business, and they cite a large number of cases, such as Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, where it is said that everyone has such absolute right, even though thereby incidentally he may interfere with and injure the business of another who has the same name. This case was cited with approval by the same court in the later case of Howe Scale Co. v. Wyckoff, Seaman & Benedict, 196 U. S. 118, where it was held that such right existed in the absence of contract, fraud or estoppel. The opinion cites Brown Chemical Co. v. Meyer, 139 U. S. 540; Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169; Elgin Nat'l Watch Co. v. Ill. Watch Case Co., 179 U. S. 865. Defendants also cite Warshawsky v. A. Warshawsky



A. Co., 257 Ill. App. 571, where this court said in substance that it was well settled that a personal name could not be exclusively appropriated by anyone as against others having a right to use it, and that an ordinary family surname was manifestly incapable of exclusive appropriation as a valid trademark and its registration as such could not itself give it validity.

The proposition has received unusual and careful consideration in Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S. 267, where the U. S. Supreme court in an opinion by Mr. Justice Holmes held that under the circumstances which existed in that case "an injunction against using any name, mark or advertisement indicating that the plaintiff is the successor of the original company or that its goods are the product of that company or its successors, or interfering with the good will bought from it, will protect the right of the Herring-Hall-Marvin Safe Company, and is all that it is entitled to demand." In that case, of course, there was no contention, as here, that the name was being used with the intent to defraud or for other than an honest and legitimate purpose.

We think there is practically no conflict in the cases which consider this proposition, as will be seen by an examination of Jamieson & Co. v. Jamieson, 18 R. P. C. 169, where the court in substance said that a man ought not to be restrained from doing business in his own name because there were people who were doing the same and who would be injured by what he was doing, adding that it would be intolerable if the court were to interfere and prevent people from carrying on business in their own names in rivalry with others of the same name. In the same case one of the concurring Judges said that he did not think there was any case, or ever had been one, where it had been held that a man who happened to bear a particular name was debarred from entering into any trade merely because there was somebody else of the same name who had acquired



...that the name "H. H. H." was not used in connection with  
it was well settled that a person's name could not be exclusively  
appropriated by anyone as against others having a right to use it,  
and that an ordinary family name was generally incapable of  
exclusive appropriation as a valid trademark and its registration  
as such could not itself give it validity.  
The registration was therefore invalid and void from the beginning.  
Also in Harley v. H. H. H., 100 F. 2d 1007,  
where the H. H. H. name was used in connection with  
held that under the circumstances which existed in that case "an  
information against using any name, mark or device in violation  
that the plaintiff is the successor of the original company or that  
its goods are the product of that company or its successors, or in-  
existing with the goods will be taken from it, will protect the right  
of the Harley-H. H. H. Company, and is all that it is en-  
titled to demand." In that case, of course, there was no contention,  
as here, that the name was being used with the intent to defraud or  
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same and who would be injured by what he was doing, adding that it  
would be injurious to the public to have the name used in connection  
with goods from carrying on business in their own names in rivalry with  
others of the same name. In the same case it was held that  
there was no right in the name which was used, as was said  
from and, where it was found that a man was engaged in doing a  
certain kind of work and that he was using the name in connection  
therein that was necessary and of the same kind and not injurious

a great reputation in the manufacture of the particular goods dealt with in his trade. This general rule was adhered to by the Supreme court of Illinois in Johnson Mfg. Co. v. Johnson Skate Co., 313 Ill. 106, where it was argued that the name "Johnson" was a family name in ordinary use which might not be appropriated as a trademark, and the court, approving the contention, said that the use of a family name by a corporation stood upon the same footing as its use by an individual or a firm, and cited Howe Scale Co. v. Wyckoff, etc., 198 U. S. 118. To the same effect is Milton v. Milton, 104 Atl. 375.

These cases also hold that in the absence of fraud, contract or estoppel the proposition is applicable, even though incidentally such use may interfere with and injure the business of another who has the same name; that under like circumstances the use of the family name by a corporation formed by the members of the family is a rightful use of it, and that in the absence of negative covenants a defendant may not be barred from so using the family name. These cases hold, as defendants contend, that the law does not recognize an exclusive right to use a surname as against others who bear that name, and that priority in time in the use of such name as a trade name is not a controlling circumstance. The rule, however, is not without its limitations, as an examination of these cases will show. In the first place, it is an honest use of such a name that the law permits, not a dishonest or an unreasonable use. This limitation is also stated in Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, where the opinion states:

"But although he may thus use his name, he cannot resort to any artifice, or do any act calculated to mislead the public as to the identity of the business, firm or establishment, or of the article produced by them, and thus produce injury to the other, beyond that which results from a similarity of names."

The case of Howe Scale Co. v. Wyckoff, Semmens & Benedict, 198 U. S. 118, also recognizes the limitation, saying:

a great reputation in the manufacture of the particular goods dealt with in his trade. This general rule was adhered to by the Supreme Court of Illinois in Johnson v. Johnson, 104 Ill.

100, where it was argued that the name "Johnson" was a family name in ordinary use which might not be appropriated as a trademark, and the court, approving the contention, said that the use of a family name by a corporation stood upon the same footing as its use by an individual as a firm, and cited First State Co. v. Fidelity, 100

100 U. S. 118. To the same effect is Ellison v. Allison, 104 Ill. 375. These cases also hold that in the absence of fraud, concerted

or estoppel the prohibition is applicable, even though incidentally such use may interfere with and injure the business of another who has the same name; that under like circumstances the use of the

family name by a corporation formed by the members of the family is a rightful use of it, and that in the absence of negative evidence a defendant may not be barred from so using the family name. These

cases hold, as defendant contends, that the law does not recognize an exclusive right to use a surname as against others who bear that name, and that priority in time in the use of such name as a trade

name is not a controlling circumstance. The rule, however, is not without its limitations, as an exception to these cases will arise in the first place, if it is shown that the name was used by one

party, not a defendant or an unsuccessful one. This limitation is also stated in Johnson v. Johnson, 104 Ill. 100.

These are the points raised.

"It is argued that any time one has a name, he cannot prevent its use by others, and that he is entitled to control its use as to the identity of the business, like an individual, and that the courts should so rule, and that priority in time when the name was used by one party would be a sufficient ground for an injunction against its use by another."

The case of First State Co. v. Fidelity, 100 U. S. 118, also

has been considered in this connection, and



"We held that in the absence of contract, fraud or estoppel, any man may use his own name, in all legitimate ways, and as the whole or a part of a corporate name."

This exception, too, has been recognized by the Supreme court of Illinois in Allcaratti v. Chocolate Dream Co., 177 Ill. 129, where it is said:

"If defendants established their new business and sought to conduct it with the fraudulent and wrongful intention of attracting to themselves the custom intended for appellee, this is clearly a fraud upon the rights of the latter."

The United States Supreme court, again speaking through Mr. Justice Holmes, in Waterman v. Modern Pen Co., 235 U. S. 38, said in substance that there was no distinction between corporations and natural persons in the principle which is to prevent fraud, and that no additional immunity is derived from the fact that the corporate name is that of one or more of the incorporators; that the name must nevertheless be honestly and fairly used, citing Westphal v. Westphal's World's Best Corp., 243 N. Y. 539, affirmed without opinion 216 App. Div. 53; Marrett Burial & Cremation Co. v. Marrett Co., 155 App. Div. 564, modifying 214 N. Y. 676. The same rule has been recognized in the courts of Pennsylvania and Michigan (Hires Co. v. Hires, 182 Pa. St., 346; Helding Cleaners & Dyers v. Helding, 245 Mich. 243), and Hopkins' Unfair Competition, 4th ed., p. 181, states the limitation with reference to the use of a surname, saying that "consent by an incorporator to the use of his name and the adoption thereof in naming the corporation gives the name a trade or business identity and estops the proprietor from thereafter using his name in a competing business." See also Tierney Bros. Inc. v. Tierney Bros., Inc., 130 Misc. 428, 224 N. Y. S. 144. The English cases also are to the same effect. Tsofani & Co. v. A. Tsofani, 2 Chanc. (Eng.) 1913, p. 545, vol. 2, Law Reports.

Any extended discussion of these cases would unduly extend



the opinion and is unnecessary since the controlling principles are, as we view it, simple and clear. A man has the right to the use of his own name, and if he uses it honestly, but he has no right to use his own name where he has lawfully contracted that he will not do so, nor where the use of it will amount to the perpetration of a fraud, nor under circumstances where by the rules of law he would be estopped from using it.

The evidence in this case sustains by an overwhelming preponderance the allegation of the bill to the effect that the use of this family name was for such unlawful purpose. It alleges and shows practically without contradiction that J. A. Lomax while president and manager of the plaintiff Delaware corporation proceeded with other defendants to conspire to appropriate to his own use and secure for himself and others who were acting with him the business of that corporation. Defendants say that the decree is not supported by the evidence, but as to this particular point there is no discussion of the evidence, defendants relying solely upon the technical contentions that the title of complainants as to trademarks, etc., was not sufficiently established, and that ~~the~~ evidence was not introduced to show affirmatively that consumers of the goods had been confused or deceived by the conduct of defendants. As a matter of fact, complainants claim title through the chattel mortgage executed by J. A. Lomax when he was the president of the plaintiff Delaware corporation, and his execution of the mortgage seems to have been approved by the directors of the company. There is no evidence to the contrary, and this is, we think, prima facie sufficient. The mere fact, which is conceded, that the Delaware corporation had been adjudged a bankrupt and a trustee appointed would not be sufficient to disprove that title, in the absence of any bill filed by the trustee in order to recover the property. Plymouth County Trust Co. v. MacDonald, 53 Fed. (2nd) 827. Neither does the Trust Co. v. MacDonald



The opinion and is necessarily also the controlling principle etc., as we view it, simple and direct. A man has the right to the use of his own name, and if he uses it honestly, and he has no right to use his own name where he has lawfully contracted that he will not do so, not where the use of it will amount to the perpetration of a fraud, not under circumstances where by the rules of law he would be estopped from using it.

The evidence in this case consists of an overwhelming preponderance of the opinion of the jury to the effect that the use of this family name was for such unlawful purpose. It is stated that there is no evidence of any intention on the part of Jones while president and manager of the plaintiff's business corporation to proceed with other defendants in carrying on business as to his own use and account for himself and others who were acting with him the business of that corporation. Defendants say that the name is not connected by the evidence, but as to this particular name there is no intention on the part of the plaintiff's business to rely solely upon the fact that the plaintiff's business is not connected with the plaintiff's business, etc., has not sufficiently connected with the plaintiff's business to be connected with the plaintiff's business, and that the name is not connected with the plaintiff's business. It is also stated that the name had been connected with the plaintiff's business by the plaintiff's business, as a matter of fact, connected with the plaintiff's business through the plaintiff's business excepted by J. A. Jones when he was the president of the plaintiff's business corporation, and his execution of the mortgage seems to have been approved by the plaintiff's business. There is no evidence to the contrary, and also it is stated, after Jones withdrew from the plaintiff's business, that the plaintiff's business had been subjected to a mortgage and a certain amount of money was paid to the plaintiff's business and also, in the absence of any bill filed by the plaintiff's business to recover the money. It is also stated that the plaintiff's business does the

were adjudication of bankruptcy destroy the corporate identity, certainly not in the absence of scheduling its good will as a part of the assets, which the bankruptcy act does not compel the bankrupt corporation to do. In that case, the trustee in bankruptcy takes only the tangible assets, accounts receivable, etc., leaving the corporate entity intact, and, indeed, the bankrupt being discharged of its debts may continue to do business if its stockholders are able to finance such a venture. Theobald-Jensen Elec. Co. v. Harry I. Wood Elec. Co., 285 Fed. 29. More than this, it is undisputed that complainants were in possession of the property, and defendants are in no position to raise any objection to the title under the circumstances. Kind on Unfair Competition & Trademarks, 3rd ed., par. 384, p. 974.

As to the proof of confusion as to the manufacturer of the goods sold, evidence of that kind was offered and objected to by defendants, and their objection was sustained. Having objected to such evidence, defendants are not now in a position to successfully contend that they were injured because such evidence is not in the record. Home Bldg. & Loan Assoc. v. Mahay, 217 Ill. 551; Chicago & A. Ry. Co. v. Walker, 217 Ill. 608; Owen v. Crumbaugh, 228 Ill. 380.

Finally, defendants contend that complainants may not sustain this suit, because they came into court with unclean hands. The rule of equity that they who claim relief against frauds of others must themselves be free from imputation of fraud is unquestioned (Manhattan v. Wood, 108 U. S. 218; American University v. Wood, 294 Ill. 186; Stevens-Davis Co. v. Mather & Co., 230 Ill. App. 45), but that rule, too, has its obvious and necessary limitations. It has never been construed to mean that the rights of a complainant in a court of equity should be determined by his general character for just and fair dealing. The rule is limited to unfair and inequitable conduct with reference to the particular transactions

were admitted to partnership and the partnership was  
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 ruptcy takes only the tangible assets, accounts receivable, etc.,  
 leaving the corporate entity intact, and, indeed, the partnership being  
 dissolved at its date may continue to do business if its stock-  
 holders are able to do so under such a statute. 1901-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-100-101-102-103-104-105-106-107-108-109-110-111-112-113-114-115-116-117-118-119-120-121-122-123-124-125-126-127-128-129-130-131-132-133-134-135-136-137-138-139-140-141-142-143-144-145-146-147-148-149-150-151-152-153-154-155-156-157-158-159-160-161-162-163-164-165-166-167-168-169-170-171-172-173-174-175-176-177-178-179-180-181-182-183-184-185-186-187-188-189-190-191-192-193-194-195-196-197-198-199-200-201-202-203-204-205-206-207-208-209-210-211-212-213-214-215-216-217-218-219-220-221-222-223-224-225-226-227-228-229-230-231-232-233-234-235-236-237-238-239-240-241-242-243-244-245-246-247-248-249-250-251-252-253-254-255-256-257-258-259-260-261-262-263-264-265-266-267-268-269-270-271-272-273-274-275-276-277-278-279-280-281-282-283-284-285-286-287-288-289-290-291-292-293-294-295-296-297-298-299-300-301-302-303-304-305-306-307-308-309-310-311-312-313-314-315-316-317-318-319-320-321-322-323-324-325-326-327-328-329-330-331-332-333-334-335-336-337-338-339-340-341-342-343-344-345-346-347-348-349-350-351-352-353-354-355-356-357-358-359-360-361-362-363-364-365-366-367-368-369-370-371-372-373-374-375-376-377-378-379-380-381-382-383-384-385-386-387-388-389-390-391-392-393-394-395-396-397-398-399-400-401-402-403-404-405-406-407-408-409-410-411-412-413-414-415-416-417-418-419-420-421-422-423-424-425-426-427-428-429-430-431-432-433-434-435-436-437-438-439-440-441-442-443-444-445-446-447-448-449-450-451-452-453-454-455-456-457-458-459-460-461-462-463-464-465-466-467-468-469-470-471-472-473-474-475-476-477-478-479-480-481-482-483-484-485-486-487-488-489-490-491-492-493-494-495-496-497-498-499-500-501-502-503-504-505-506-507-508-509-510-511-512-513-514-515-516-517-518-519-520-521-522-523-524-525-526-527-528-529-530-531-532-533-534-535-536-537-538-539-540-541-542-543-544-545-546-547-548-549-550-551-552-553-554-555-556-557-558-559-560-561-562-563-564-565-566-567-568-569-570-571-572-573-574-575-576-577-578-579-580-581-582-583-584-585-586-587-588-589-590-591-592-593-594-595-596-597-598-599-600-601-602-603-604-605-606-607-608-609-610-611-612-613-614-615-616-617-618-619-620-621-622-623-624-625-626-627-628-629-630-631-632-633-634-635-636-637-638-639-640-641-642-643-644-645-646-647-648-649-650-651-652-653-654-655-656-657-658-659-660-661-662-663-664-665-666-667-668-669-670-671-672-673-674-675-676-677-678-679-680-681-682-683-684-685-686-687-688-689-690-691-692-693-694-695-696-697-698-699-700-701-702-703-704-705-706-707-708-709-710-711-712-713-714-715-716-717-718-719-720-721-722-723-724-725-726-727-728-729-730-731-732-733-734-735-736-737-738-739-740-741-742-743-744-745-746-747-748-749-750-751-752-753-754-755-756-757-758-759-760-761-762-763-764-765-766-767-768-769-770-771-772-773-774-775-776-777-778-779-780-781-782-783-784-785-786-787-788-789-790-791-792-793-794-795-796-797-798-799-800-801-802-803-804-805-806-807-808-809-810-811-812-813-814-815-816-817-818-819-820-821-822-823-824-825-826-827-828-829-830-831-832-833-834-835-836-837-838-839-840-841-842-843-844-845-846-847-848-849-850-851-852-853-854-855-856-857-858-859-860-861-862-863-864-865-866-867-868-869-870-871-872-873-874-875-876-877-878-879-880-881-882-883-884-885-886-887-888-889-890-891-892-893-894-895-896-897-898-899-900-901-902-903-904-905-906-907-908-909-910-911-912-913-914-915-916-917-918-919-920-921-922-923-924-925-926-927-928-929-930-931-932-933-934-935-936-937-938-939-940-941-942-943-944-945-946-947-948-949-950-951-952-953-954-955-956-957-958-959-960-961-962-963-964-965-966-967-968-969-970-971-972-973-974-975-976-977-978-979-980-981-982-983-984-985-986-987-988-989-990-991-992-993-994-995-996-997-998-999-1000-1001-1002-1003-1004-1005-1006-1007-1008-1009-1010-1011-1012-1013-1014-1015-1016-1017-1



concerning which he asks the aid of the court. Defendants say that complainants and their predecessors used labels making untrue statements as to the ingredients of some of the beverages sold. It is said that "Lomax Pepsin Ginger Ale" was sold to the public with a label containing the statement, "Lomax Pepsin Ginger Ale is made from pure Jamaica ginger combined with papain and aromatics," and that this statement is untrue, the master having found neither pure Jamaica ginger nor pepsin was used as an ingredient. Another of the products sold by complainants was known as "Old Tom Lime Riskey," and it is said that it was sold by complainants in bottles bearing labels which contained the statement, "Made from West Indian limes, pure ginger root, lemons and oranges from California, Hawaiian sugar, aerated water;" that this statement was untrue, and that the master so found. Defendants also say that another product sold by complainants under the name of "Lomax Club Root Beer" was marketed with a label containing the statement, "A combination of roots, herbs and barks sweetened with cane sugar," and that this statement also was untrue. The master, however, was of the opinion and found that there was no fraud upon the public in these respects. Defendants say that there is no basis in the record for the opinion that there was no fraud upon the public "as there was no testimony whatsoever concerning that matter." It is elementary, however, that fraud must be established by affirmative proof on the part of the party who pleads and relies upon it. There was such proof in the cases upon which defendants rely: Keeley v. Hargreaves, 236 Ill. 316; Leach v. Scarff, 186 Fed. 446; Perfection Mfg. Co. v. E. Coleman Silver's Co., 270 Fed. 578, and other cases. The mere proof that a statement is untrue does not, of course, establish that it is fraudulent in character. Moreover, even if there were such proof, the



evidence indicates that these transactions were had at a time when the principal defendant was the manager and in control of the plaintiff corporation, and he and the defendants who have acted with him are hardly in a position to set it up. Further, the sale of these articles is not shown to have been directly connected with the subject matter of this litigation.

Upon the controlling issue in this case, namely, that of the fraudulent intention and conduct of these defendants, the proof in the record sustains the finding of the court.

The only serious doubt we entertain upon this record concerns whether the decree should have granted to complainants the relief to which they were entitled without making the injunction against the use of their own name absolute. Upon rendering a majority of the court - the writer not concurring - held that the decree should be modified so as to allow the defendants to engage in the beverage business, either as individuals, a corporation, or as a partnership, to employ any and all servants necessary to conduct the business, and to do any and all acts incidental to the conduct of the business so long as their labels, advertising and other printed matter affirmatively indicate to prospective customers that their products are not manufactured or sold by complainants or either of them, or their predecessors. The modification should be of the character indicated in Allegretti v. Chocolate Cream Co., 177 Ill. 129, and Johnson Mfg. Co. v. Johnson Skate Co., 313 Ill. 106.

The costs of this appeal will be taxed against defendants and the decree reversed and the cause remanded with directions to the Chancellor to modify the same in conformity with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor and McSurely, JJ., concur.



evidence indicates that these transactions were had at a time when the principal defendant was the manager and in control of the plaintiff corporation, and he and the defendant who have acted with him are jointly in a position to set it up. Further, the sale of these articles is not shown to have been directly connected with the subject matter of this litigation.

Upon the controlling issue in this case, namely, that of the fraudulent nature and conduct of these defendants, the proof in the record sustains the finding of the court. The only serious doubt we entertain upon this record concerns whether the state should have granted its recognition to relief to which they were entitled without making the injunction against the use of their own name absolute. Upon rendering a majority of the court - the writer not concurring - held that the decree should be modified so as to allow the defendants to engage in the beverage business, either as individuals, a corporation, or as a partnership, to employ any and all servants necessary to conduct the business, and to do any and all acts incidental to the conduct of the business so long as their labels, advertising and other printed matter exclusively relating to proprietary customers that their products are not manufactured or sold by complainants or either of them, or their predecessors. The modification should be of the character indicated in Attorney v. Industrial Cases, 177 T. 201, and Industrial v. Attorney, 211 Ill. 104. The court at this point will be fixed against defendant and the decree reversed and the name removed with directions to the defendant to modify the name in conformity with the view herein expressed.

REVEREND AND HONORABLE WITH DIRECTING.

Witness my hand and seal, this 11th day of June, 1911.

37306

WILLIAM C. FENNIS,  
Plaintiff in Error,

vs.

CHICAGO AUTOMOBILE REPAIRING  
WORKS, INC., a Corporation,  
JOSEPH M. TRIEDL and J. W. HEARMAN,  
Defendants in Error.

ERROR TO SUPERIOR COURT  
OF COOK COUNTY.

274 I.A. 662

HON. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

By this writ of error complainant seeks to reverse a decree of the Superior court entered July 12, 1933, which dismissed the bill of complaint without costs for want of prosecution. The decree recites that the action was regularly called for trial; that no one appeared to prosecute, and that the dismissal was upon the motion of the court.

The bill was filed March 5, 1933, and alleges that complainant brings suit in behalf of himself and other creditors who might choose to join to secure the appointment of a receiver, the marshalling of assets and an accounting. It prayed that certain defendants should be decreed to pay the indebtedness to the extent of the unpaid portion of their capital stock; that the corporation might be wound up, and for general relief. The cause was put at issue July 14, 1933, and on the same date an order was entered referring the cause to a master in chancery. The cause was pending before the master on this reference at the time the order was entered dismissing the bill. November 29, 1933, the master filed a report recommending that the decree should be entered in favor of complainant against all the defendants, except one.

That it is reversible error under such circumstances to enter a decree dismissing the bill is settled by the authorities and does not require discussion. Weil v. Mulvaney, 302 Ill. 195;

THOMAS V. SMITH,  
Plaintiff in Error.

VS.

JOHN W. SMITH,  
Defendant in Error.

2241A.008

THE VERMONT SUPREME COURT,  
Held on the 10th day of May, 1900.

By this writ of error commission made to reverse a decision of the Superior Court docketed July 12, 1899, which affirmed the bill of complaint without notice for want of prosecution. The docket reflects that the action was regularly called for trial; that no one appeared to prosecute, and that the dismissal was upon the motion of the party.

The bill was filed March 2, 1898, and alleges that defendant put up with in behalf of himself and other creditors the right of the plaintiff to the premises and equipment of a business, the surrendering of assets and an accounting. It prays that certain defendants should be decreed to pay the indebtedness to the extent of the unpaid portion of their capital stock; that the corporation might be wound up, and for general relief. The cause was set at issue July 14, 1899, and on the same date an order was entered returning the cause to a master in chancery. The cause was pending before the master on this reference at the time the writ of error complained the bill. Judgment was given for the plaintiff on a motion made by the master.

That it is reversible error under such circumstances to enter a decree dismissing the bill as settled by the authorities and does not require discussion. WILLIAM SMITH, JR. Ill. 1900.



Bill B. P. Co. v. McCarahan, 130 Ill. App. 345; McClay v. Williamson, 247 Ill. App. 141. Defendants practically concede that this is the law but seem to contend that the decree should not be reversed, because, as they say, complainant did not exhaust his remedy in the trial court before appealing. They cite a number of authorities (Toth v. Samuel Phillinson & Co., 250 Ill. App. 247; Cramer v. Ill. Commercial Man's Assn., 265 Ill. 316; Madden v. City of Chicago, 233 Ill. 155) to the effect that the trial court has power at a subsequent term to set aside an order dismissing the cause under section 89 of the Practice act, and urge that complainant should have first sought relief under that section. Unfortunately for this contention, the Supreme court has held that the proceeding under section 89 is not applicable to a decree entered in chancery. Tosatti B. Co. v. Kechlar, 200 Ill. 369. Even if such remedy had been available, it would by no means follow that complainant was obligated to seek relief under it rather than by writ of error.

For these reasons the decree is reversed and the cause remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor and McSurely, JJ., concur.

[illegible]

THE JAMES EARL RAY CASE

... ..

37044

RICHARD NEWTON, Administrator of  
Estate of JOSEPHINE NEWTON,  
Deceased,

Appellee,

vs.

METROPOLITAN LIFE INSURANCE  
COMPANY, a Corporation,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

274 I.A. 662<sup>2</sup>

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit on an industrial insurance policy issued by defendant upon the life of Josephine Newton, upon trial had a verdict for \$800, upon which judgment was entered. The policy, wherein defendant promised to pay to the administrator of Josephine Newton upon her death the sum of \$800, was issued in Toledo, Ohio, December 1, 1928. Mrs. Newton died September 26, 1930. The policy provided that if it should lapse for non-payment of premium and if not more than two years of premiums were due and unpaid, it might be revived upon payment of all arrears "and the presentation of evidence satisfactory to the company of the insurability of the insured."

The defendant asserted that the policy had lapsed for non-payment of premiums and was not in force when the insured died; that there was an attempt, by fraud and misrepresentation, to have the policy reinstated; that it was not reinstated, and the premium for the reinstatement was tendered back to plaintiff and refused by him.

Richard Newton and Josephine Newton, residing in Chicago, were divorced in 1927, and Josephine thereupon took up her residence in Toledo, Ohio, Richard remaining in Chicago; Mrs. Newton took out the policy in question from the Toledo office of the defendant, whose home office is in New York City; she paid the monthly premiums of \$2.07 each to an agent of the Toledo office, to and including the month of March, 1930, when the payment of



STATE OF NEW YORK, DEPARTMENT OF  
 COMMERCE, BUREAU OF INSURANCE,  
 ALBANY, N. Y.

IN SENATE,  
 JANUARY 11, 1934.

REPORT OF THE  
 COMMISSIONER OF INSURANCE,  
 STATE OF NEW YORK, FOR THE YEAR  
 1933.

274 I. A. 682

THE STATE OF NEW YORK, DEPARTMENT OF COMMERCE, BUREAU OF INSURANCE, ALBANY, N. Y.

Plaintiff, bringing suit on an industrial insurance policy

issued by defendant upon the life of Josephine Newton, upon trial  
 had a verdict for \$500, from which judgment was entered. The policy,

wherein defendant promised to pay to the administrator of Josephine  
 Newton upon her death the sum of \$500, was issued in Toledo, Ohio,

December 1, 1928. The policy was not delivered to plaintiff until

provided that if it should lapse for non-payment of premium and if  
 not more than two years of premium were due and unpaid, it might be

revoked upon payment of all arrears and the presentation of evi-

dence satisfactory to the company of the insurability of the insured."

The defendant asserted that the policy had lapsed for non-

payment of premiums and was not in force when the insured died;

that there was an attempt, by fraud and misrepresentation, to have  
 the policy reinstated; that it was not reinstated, and the premium

for the reinstatement was tendered back to plaintiff and refused

by him.

Richard Newton and Josephine Newton, residing in Chicago,

were divorced in 1927, and Josephine thereafter took up her resi-

dence in Toledo, Ohio. Richard remaining in Chicago; Mr. Newton

took out the policy in question from the Toledo office of the

defendant, whose home office is in New York City; and paid the

monthly premiums of \$2.00 each to an agent of the Toledo office,

so and including the month of March, 1932, when the payment of

premiums ceased.

September 17, 1930, the insured was taken ill and on the following day, the 18th, she was taken to the Maternity hospital in Toledo where on that date she was operated on for gallstones and an infected gall bladder; on the evening of the 20th Richard Newton with Mrs. Ross, a sister of insured, called at the home of William Davis in Toledo, an agent of defendant. Davis testified that Mrs. Ross represented that she was Josephine Newton, the insured; that Richard Newton, the plaintiff, was her husband, and that she wished to revive her insurance in the defendant company by paying all arrears of premium; Davis thereupon, after computing the amount of premium necessary to revive the policy, received \$12.42 and gave a receipt for the same in his name; this receipt reads that the amount received is

"a tender of past due and unpaid weekly premiums, made in connection with application to the Metropolitan Life Insurance Company for Revival of above numbered POLICY which has lapsed. No obligation under such POLICY is incurred by said Company by reason of such tender. If such application is approved by said Company, said POLICY will be reinstated and placed in full force, otherwise the sum so tendered will be returned."

On the reverse side is the following:

"If the holder of this receipt is not notified that the Policy stated on the reverse side hereof has been revived, or the amount receipted for herein is not returned within four weeks, write, stating name of Agent and particulars to

METROPOLITAN LIFE INSURANCE COMPANY,  
1 Madison Avenue, New York City."

At the same time Mrs. Ross signed the name "Josephine Newton" to a revival application, which contained, among other things, the following:

"The above described policy having lapsed for non-payment of premium, the undersigned hereby applies for a revival of such policy; and to induce the Metropolitan Life Insurance Company to revive the same, hereby represents and declares that the life heretofore insured under said policy has not, since it was issued, been sick or afflicted with any disease, or met with any accident or consulted or been prescribed for by any physician, except as stated on this application. And the undersigned expressly agrees that the said company, because of this application, incurs no liability until said company shall have approved this application for revival."

premiums received.

September 17, 1933, the insured was taken ill and on the following day, the 18th, she was taken to the Kentucky Hospital in Toledo where on that date she was operated on for gallstones and on the evening of the 20th Richard Newton Newton was admitted into the hospital; on the evening of the 21st, a sister of insured, called at the home of William Davis in Toledo, an agent of defendant. Davis testified that Mrs. Newton requested that she was Josephine Newton, the insured; that Richard Newton, the plaintiff, was her husband, and that she wished to revive her insurance in the defendant company by paying all arrears of premium; Davis thereupon, after consulting the amount of premium necessary to revive the policy, testified \$10.48 and gave a receipt for the same in his name; this receipt reads that the amount received is

"A check of \$10.48 was made and insured's weekly premiums, made in connection with application to the Metropolitan Life Insurance Company for revival of above mentioned POLICY which was issued, at expiration of term, POLICY is renewed by said company by means of said check. It was explained to insured at said company, said POLICY will be reinstated and placed in full force, provided the sum so demanded will be returned."

On the reverse side is the following:

"If the holder of this receipt is not notified that the policy placed on the reverse side hereof has been revived, or the amount requested for revival is not returned within ten days, written notice of Agent and particular to METROPOLITAN LIFE INSURANCE COMPANY, 1 Madison Avenue, New York City."

At the same time Mrs. Newton signed the name "Josephine Newton" to a revived application, which contained, among other things, the following:

"The above described policy having lapsed for non-payment of premium, the undersigned hereby applies for a revival of said policy; and to induce the Metropolitan Life Insurance Company to revive the same, hereby testifies and declares that the insured, Josephine Newton, said policy has not, since it was issued, been used in violation with any disease, or not with any accident or annuity or have been transferred for any physician, except as stated on this application. And the undersigned expressly agrees that the said company, pursuant to this application, intends to issue POLICY which said company shall have approved this application for revival."



Davis says that at this interview he did not know that Mrs. Ross was not Josephine Newton; that the following day, because of some things which aroused his suspicions, he went to the neighborhood in Toledo where these people lived and apparently then learned that the woman who signed the application was not Josephine Newton but was her sister, Mrs. Ross.

Mrs. Ross testified, contradicting Davis' version of what happened. She says she informed Davis that she came to pay her sister's insurance - Josephine Newton's; that Davis said, "How is Mrs. Newton?" that she replied, "Mrs. Newton isn't so well \* \* she is sick in bed," and that thereupon Davis said, "All right," and told her to sign insured's name on the revival application. The insured died September 28th following the operation.

October 3rd plaintiff filed a claim on the policy with proof of death with a Mr. Harrington, an agent for defendant in Chicago; Harrington told plaintiff to call back in about twelve days; that when he called at this time he was told nothing had been heard from defendant; October 28th he again called on Harrington and was then told the company would not pay under the policy, and Harrington tendered to plaintiff a refund of the premium paid on the application for revival, which plaintiff refused.

If Davis' testimony was true there was obviously a fraud attempted by the posing of Mrs. Ross as the insured, Josephine Newton. In such a case plaintiff could not recover. Hancock v. Knights of Security, 303 Ill. 66. Plaintiff argues, however, that the jury was justified in accepting Mrs. Ross' version, and that when Davis accepted the tendered premium and defendant took no action thereon until October 28th, when it refused payment on the policy, defendant waived any right to claim that the policy had not been revived and was not in force and effect at the time of the

David says that at this interview he did not know that Mrs. Rose was not Benjamin Newton; that the following day, because of some things which aroused his suspicions, he went to the neighborhood in Toledo where these people lived and subsequently then learned that the woman who signed the application was not Benjamin Newton but was her sister, Mrs. Rose.

Mrs. Rose testified, contradicting David's version of what happened. She says she informed David that she came to pay her sister's insurance - Benjamin Newton's; that David said, "This is Mrs. Newton?" that she replied, "Yes, Newton isn't so well" and is sick in bed," and that Benjamin David said, "All right," and told her to sign insured's name on the revival application. The insured died September 20th following the operation.

October 2nd plaintiff filed a claim on the policy with Great of death with a Mr. Harrington, an agent for defendant in Chicago; Harrington told plaintiff to call back in about twelve days; that when he called at this time he was told nothing had been heard from defendant; October 20th he again called on Harrington and was then told the company would not pay under the policy, and Harrington furnished to plaintiff a return of the premium paid on the application for revival, which plaintiff returned.

If David's testimony was true there was obviously a fraud attempted by the policy of Mrs. Rose as the insured, Benjamin Newton. In such a case plaintiff could not recover. Benjamin R. Newton et al. v. Great Northern Life Insurance Co., 103 Ill. 66. Plaintiff argues, however, that the jury was justified in accepting Mrs. Rose's version, and that Mrs. Rose received the life insurance premium and defendant took no action against her until December 1901, when it returned payment on the policy. Plaintiff relies on the fact that the policy had not been received and was not in force and effect at the time of the

insured's death.

There have been many cases touching waiver by an agent of an insurance company, but most of them involve the question of the payment of a premium some little time after the date of payment stated in the policy. In such cases, where the custom has been for an agent to receive premiums a few days after the due date, the company will be held to have waived its right to declare a forfeiture for non prompt payment. Chicago Life Ins. Co. v. Warner, 80 Ill. 410; Conductors' Benefit Assoc. v. Tucker, 187 Ill. 194; Illinois Life Assoc. v. Wells, 200 Ill. 445.

In the present case we have a policy, admittedly lapsed, which there is an attempt to revive. By the terms of the policy the revival may be accomplished upon the presentation of satisfactory evidence to the company of the insurability of the insured; the receipt given for the arrears of premiums expressly states that this is a tender and the company assumes no obligations under the policy until the application for revival has been approved by the company; the revival application is upon the condition that the insured has not been sick, afflicted with any disease or treated by any physician since the policy was issued. But it is argued that Davis, the agent of defendant, and the defendant, by receiving and retaining the premiums for a time, waived compliance with these conditions. Among the many cases touching the subject of waiver, under similar circumstances, one of the best statements is found in the case of Ferrero v. Knights of Security, 309 Ill. 476, where the court said:

"A waiver is the intentional relinquishment of a known right, and there must be both knowledge of the existence of the right and the intention to relinquish it. (Perin v. Parker, 126 Ill. 201.) In Syman v. Manufacturers and Merchants Life Ass'n, 262 Ill. 300, a waiver was set up, and the court held that knowledge is always a necessary element to constitute a waiver, and that receiving assessments with the knowledge that the insured was ill at the



Insurance's Death.

There have been many cases involving waiver by an agent of an insurance company, but most of them involve the question of the payment of a premium some little time after the date of payment stated in the policy. In such cases, where the contract has been for an agent to receive premiums a few days after the due date, the company will be held to have waived the right to declare a forfeiture for non payment.

Insurance Co. v. Davis, 100 Ill. 400, 1884.

Illinois Life Assn. v. Wells, 200 Ill. 403.

In the present case we have a policy, which is subject to which there is an attempt to revive. By the terms of the policy the revival may be accomplished upon the presentation of satisfactory evidence to the company of the insurability of the insured; the receipt given for the amount of premium expressly states that this is a tender and the company assumes no obligation under the policy until the application for revival has been approved by the company; the revival application is upon the condition that the insured has not been sick, afflicted with any disease or treated by any physician since the policy was issued. But it is argued that Davis, the agent of defendant, and the defendant, by receiving and retaining the premiums for a time, waived compliance with these conditions. Among the many cases touching the subject of waiver, under similar circumstances, one of the best statements is found in the case of Insurance Co. v. Davis, 100 Ill. 400, 1884.

The court said:

"A waiver is an intentional relinquishment of a known right, and there must be some knowledge of the existence of the right and the intention to relinquish it. (Insurance Co. v. Davis, 100 Ill. 400, 1884.) In the present case, the agent of the company, by receiving and retaining the premiums for a time, waived compliance with these conditions, and the defendant, by receiving and retaining the premiums for a time, waived compliance with these conditions, and the defendant, by receiving and retaining the premiums for a time, waived compliance with these conditions."

time could have no significance if the agent was ignorant of the fact that the insured was in bad health when the certificate was delivered and the first assessment paid. To constitute a waiver it is essential that there is an existing right, benefit or advantage, knowledge, actual or constructive of its existence, and an intention to relinquish it, and the burden of proof is upon the party claiming a waiver to prove that the one charged to have waived the right knew of the fact that entitled him to the right and the facts upon which he relies for such waiver."

This element of knowledge of all the facts on the part of the person claimed to have waived a right is held essential in all of the decided cases which we have seen.

Plaintiff in his brief repeatedly asserts that Davis and defendant knew all the facts as to the insured's physical condition. The record before us does not support this. At the time Mrs. Rose interviewed Davis, Josephine Newton had undergone a major operation threatening her life, which, with a failing heart, resulted in her death within a few days. Mrs. Rose, according to her testimony, told Davis only that "Mrs. Newton is sick in bed." This is far from imparting to Davis all the facts as to the condition of the insured. It is inconceivable that if defendant <sup>had</sup> known that the insured was in fact on her death bed that the request for revival of the policy would have been approved. According to this record, the first time the defendant company knew all the facts was when the proofs of claim were received by it, which was some time in October. Under such circumstances the defendant cannot be said to have waived its right to withhold approval of the application for revival.

The instructions given the jury were very misleading. One attempted to define the duties of a general agent, indicating that Davis had power to waive conditions in the policy. Further, that if the jury should find that Davis accepted payments of premiums on the policy of Josephine Newton and "that said general agent had, or then and there received, knowledge as to the condition of Josephine Newton's health," and if he accepted payment of premiums

time could have no significance if the agent was ignorant of the fact that the insured was in bad health when the certificate was delivered and the first assessment paid. To constitute a waiver it is essential that there is an existing right, demand or claim, known, knowledge, actual or constructive of its existence, and an intention to relinquish it, and the intent of giving it when the party claiming a waiver to prove that the one charged to have waived the right knew of the fact that entitled him to the right and that he was not a minor or insane.

This element of knowledge of all the facts on the part of the person claimed to have waived a right is held essential in all of the decided cases which we have seen.

Plaintiff in his brief repeatedly asserts that Davis and defendant knew all the facts as to the insured's physical condition. The record before us does not support this. At the time Mrs. Howe interviewed Davis, Josephine Newton had undergone a major operation and was in a hospital, with a broken back, confined in bed, unable to walk a few days. Mrs. Howe, according to her testimony, told Davis only that "her mother is also in bed." This is far from imparting to Davis all the facts as to the condition of the insured. It is inconceivable that it behooved Newton that the insured was in fact on her death bed that the record for revival of the policy would have been removed. According to this record, the first time the defendant company knew all the facts was when the proofs of claim were received by it, which was some time in October. Under such circumstances the defendant cannot be said to have waived its right to withhold approval of the application for revival.

The instructions given the jury were very misleading. One attempted to define the office of a general agent, indicating that Davis had never so much as been mentioned in the policy. Newton, that if the jury should find that Davis accepted payments of premiums on the policy at Josephine Newton's request and that said general agent was of legal age and sane mind, "whether or not condition of Josephine Newton's health," and if he accepted payment of premiums



in arrears unconditionally and forwarded them to defendant unconditionally, then, in law, the general agent is held to have waived any forfeiture and to have waived any conditions in the policy as to the insurability of the insured, and that the defendant was bound by said waiver, and under such conditions the jury should find the issues for the plaintiff. The vice in these instructions is apparent. There was no evidence that Davis was a general agent or that he received the payment of the premiums unconditionally, or had knowledge of the facts of Josephine Newton's health, or forwarded the premiums to the defendant unconditionally.

For the reasons that the verdict is against the manifest weight of the evidence, that the verdict should have been for the defendant, and that the instructions tended to mislead the jury, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, J., concurs.

Matchett, P. J., dissents. (See next page.)

in writing and the same is to be given to the insured.

Additionally, then, the general agent is held to have waived any forfeiture and to have waived any conditions in the policy as to the insurability of the insured, and that the insured was bound by said waiver, and under such conditions the jury should find the insured for the plaintiff. The vice in these instructions is apparent. There was no evidence that Davis was a

general agent or that he received the payment of the premium. Additionally, he was not a resident of the State of California. The insured, or intended the premium to the defendant's agent.

For the reasons that the verdict is against the plaintiff on the weight of the evidence, and the verdict should have been for the defendant, and that the instructions tended to mislead the jury,

the judgment is reversed and the case remanded.

REVEREND THE COURT.

Noted: J. J. Gorman. (See next page.)

37044

MR. PRESIDING JUSTICE MATCHETT DISSENTING.

This cause was consolidated in this court with No. 37045, and I agree with the suggestion of the majority opinion that if again tried the same should be consolidated in the trial court. The parties, the issues and the material evidence in both cases are in substance the same. I do not agree with the majority of the court that the verdicts of the two juries who sat in these cases are manifestly against the evidence, but I do not rest my dissent upon that point alone.

These cases were of the fourth class in the Municipal court where pleadings are not required, and each case is whatever the evidence makes it. Edgerton v. C. E. I. & P. Ry. Co., 240 Ill. 311; Bruner v. Grand Trunk Western Ry. Co., 319 Ill. 421. Assuming, as the opinion of the court seems to indicate, that Richard Newton and Mrs. Ross perpetrated a fraud on the insurance company through Mrs. Ross posing and representing herself to be in fact Josephine Newton, I think the jury under the evidence could reasonably find that the forfeiture of each of the policies was thereafter waived. Davis testifies that he reported the facts as to the transaction of September 20th in writing to defendant company at its office in Toledo on the day after its occurrence, namely, September 21, 1930. Defendant then must be held to have known from that date that Josephine Newton was in the hospital at Toledo, Ohio, and that up to the time she died she could have been reached there. The evidence also shows that its agent knew the home address of her family in that city. So far as this record discloses the first repudiation of the transaction was 37 days thereafter. There is not a scintilla of evidence in the record that defendant during all that time took any steps whatever to return the premium on these policies which its agent had accepted.





In these days when information is speedily transmitted by mail and telegraph and telephone, I think the jury could reasonably find that the delay was unreasonable.

In Traders Mutual Life Ins. Co. v. Johnson, 200 Ill. 359, it was held that the acceptance of proofs of death after full knowledge showed an intention on the part of defendant to waive the alleged forfeiture. That waiver may be based upon information given to an agent authorized to solicit business was held in a suit based on a fire insurance contract in Phoenix Fire Ins. Co. v. Grove, 218 Ill. 299. The same rule was again applied to a life insurance policy by the third division of this court in Adam v. Columbian Nat'l Life Ins. Co., 218 Ill. App. 54, in an opinion delivered by Mr. Justice O'Connor. These cases in my opinion express the law applicable (not alone to insurance policies but to all contracts) that a defendant who wishes to disavow a transaction on the ground of fraud must act with the utmost promptness. There is a wealth of authority to that effect which I deem it unnecessary to review at length. The controlling question, as I see it, is one of waiver, and not whether the contract was reinstated in conformity with its own provisions. There is no doubt that Davis was the agent of the defendant company, and if there were any doubt in that respect it is made immaterial by his uncontradicted evidence that the Toledo office of the defendant company was fully informed of the whole transaction on September 21st.

The prevailing opinion makes much of alleged errors in the instructions. An examination discloses, however, that the court instructed the jury orally and that there was no specific objection by defendant to any one of these instructions. In one of the

In these days when information is speedily transmitted by mail and  
telegram and telephone, I think the jury could reasonably find  
that the delay was unnecessary.

In Federal United Life Ins. Co. v. Johnson, 200 Ill. 352,

it was held that the acceptance of policy of death after trial  
knowledge showed an intention on the part of defendant to waive  
the alleged tortiousness. That waiver may be based upon information  
given to an agent authorized to collect business was held in a  
suit based on a fire insurance contract in Federal Life Ins. Co.

v. State, 212 Ill. 357. The same rule was again applied in a  
life insurance suit by the same division of this court in State  
v. Columbia Life Ins. Co., 212 Ill. App. 3d, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42nd, 43rd, 44th, 45th, 46th, 47th, 48th, 49th, 50th, 51st, 52nd, 53rd, 54th, 55th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, 63rd, 64th, 65th, 66th, 67th, 68th, 69th, 70th, 71st, 72nd, 73rd, 74th, 75th, 76th, 77th, 78th, 79th, 80th, 81st, 82nd, 83rd, 84th, 85th, 86th, 87th, 88th, 89th, 90th, 91st, 92nd, 93rd, 94th, 95th, 96th, 97th, 98th, 99th, 100th.

delivered by Mr. Justice T. G. ... These cases in my opinion ex-  
press the law applicable (not alone to insurance policies but to  
all contracts) that a defendant who wishes to disavow a transac-  
tion on the ground of fraud must act with the utmost promptness.  
There is a wealth of authority to that effect which I deem it un-  
necessary to review at length. The controlling question, as I  
see it, is one of waiver, and the defendant who waives the right  
to set aside the contract with its own provisions. There is no doubt  
that Davis was the agent of the defendant company, and it there-  
fore was no doubt in that respect it is made incumbent by his  
unmistakable evidence that the policy was issued on September  
company was fully informed of the whole transaction on September

The prevailing opinion makes much of alleged errors in the  
instructions. It is admitted, however, that the court  
instructed the jury orally and that there was no specific objection  
by defendant to any one of these instructions. In one of the



cases there is a general objection which under that practice is wholly insufficient. Rule 2 of the Municipal court, of which we take judicial notice, requires that objections to instructions must be made specific. The brief of defendant does not point out any particular instruction which is said to be erroneous. This is supplied by the opinion of the court which plaintiff has not had the opportunity to see or discuss, and we are therefore without the benefit of his observations thereon. At any rate, the agency of Davis was more extensive than that of the agent whose authority was questioned in Germania Life Ins. Co. v. Koehler, 168 Ill. 293, where the defendant company was held liable. As I understand it, a forfeiture is rightly odious and should never be favored by the courts. United States Life Ins. Co. v. Ross, 159 Ill. 476.

For these, as well as other reasons, I dissent.

cases there is a general objection which under that question is  
 wholly inadmissible. That is at the material point, it seems to  
 have judicial notice, receiving that objection to instructions must  
 be made available. The object of defendant does not point out any  
 particular instruction which is said to be erroneous. This is  
 essential to the opinion of the court which liability has not and  
 the opportunity to see or discuss, and we are therefore without  
 the benefit of his observations. At any rate, the agency  
 of Davis was more extensive than that of the agent whose authority  
 was questioned in Seawright v. E. V. Seawright, 122 Ill. 405.  
 where the defendant company was held liable. As I understand it,  
 the court in United States v. E. V. Seawright, 122 Ill. 476,  
 for said, as well as other points, I dissent.

37045

RICHARD NEWTON, Administrator  
of Estate of JOSEPHINE NEWTON,  
Deceased,

Appellee,

vs.

METROPOLITAN LIFE INSURANCE COMPANY,  
a Corporation,

Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

274 I.A. 662<sup>3</sup>

MR. JUSTICE McDERMOT DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment for \$528.45, entered upon a verdict after a trial in which plaintiff claimed upon an insurance policy issued by defendant on the life of Josephine Newton.

We have this day filed an opinion in case No. 37044, involving the same parties, where a similar claim was made upon another policy issued by the defendant company upon the life of Josephine Newton. In that case, as in this, the question is whether the plaintiff was successful in his attempt to have a lapsed policy revived.

Plaintiff, a resident of Chicago, was divorced from Josephine Newton in March, 1927; thereupon she moved to Toledo, Ohio, and lived there until her death at that place; plaintiff remained in Chicago and remarried.

January 9, 1928, Mrs. Newton received the policy in question from the Toledo office of the defendant, whose home office is in New York City. Thereafter she paid to an agent of the Toledo office the weekly premium of forty-five cents until some time in May, 1930, when the payments ceased.

The policy provided that it could not be varied except by the express agreement of the company, evidenced by the signature of its president or secretary; also, that agents were not authorized and had no power to waive forfeitures or to receive premiums on



NYO48

RICHARD NEWTON, Administrator  
of State of JOHNSONVILLE  
Insurance

Specimen

ALBERT WOOD BURNHAM

COUNT OF CHICAGO

JOHNSONVILLE LIFE INSURANCE COMPANY  
a Corporation

274 I.A. 682

RE: JOHNSONVILLE LIFE INSURANCE COMPANY

My this report delinquent shows the payment of a judgment  
for \$333.48, entered upon a verdict after a trial in which plain-  
tiff claimed upon an insurance policy issued by defendant on the  
life of Josephine Newton.

We have this day filed an opinion in case No. 27044, in-  
volving the same parties, where a similar issue was then upon

another policy issued by the defendant company upon the life of  
Josephine Newton. In that case, as in this, the question is  
whether the plaintiff was successful in his attempt to have a

judgment policy reversed.

Plaintiff, a resident of Chicago, was married to John  
John Newton in March, 1927; defendant was moved to Toledo, Ohio,  
and lived there until her death at that place; plaintiff remained  
in Chicago and remarried.

January 9, 1928, Mrs. Newton received the policy in ques-

tion from the Toledo office of the defendant, whose home office  
is in New York City. Thereafter she paid to an agent of the Toledo

office the yearly premium of forty-five cents until she in

May, 1930, when the payments ceased.

The policy provided that it could not be varied except by

the express agreement of the company, evidenced by the signature of  
its president or secretary; also, that agents were not authorized

not had no power to vary the policy or to receive premiums on

policies more than four weeks in arrears or to receipt for the same, and the payment to the agent of any such arrears shall be at the sole risk of the person making such payment and shall not be credited as a payment upon the policy, whether receipt be given for such payment or not." It was also provided that if the policy became void in consequence of non-payment of premiums it might be revived, if not more than fifty-two premiums are due, "upon payment of all arrears and the presentation of evidence satisfactory to the company of the sound health of the insured." Thus, when the attempt was made by plaintiff to have the policy revived it had already lapsed for some months past, subject, however, to revival if the insured complied with the conditions named in the policy.

On the evening of September 20, 1930, plaintiff, with Mrs. Rees, a sister of the insured, called at the home of a Mr. Davis, who is described as an "independent agent" for the defendant company. Plaintiff testified that he told Davis that he came to reinstate Josephine Newton's policy; that Davis said that it would take \$9.45 to reinstate it; that he asked plaintiff, "Where is Mrs. Newton?" and plaintiff replied, "She is in the hospital;" that Davis said, "What hospital?" whereupon Newton replied, "The Maternity Hospital in Toledo," and Davis said, "For \$9.45 I will reinstate the policy;" that plaintiff then gave Davis this amount of money and the same was entered in the weekly premium receipt book which plaintiff had in his possession. Plaintiff thereupon returned to Chicago.

Davis testified that plaintiff and a woman came to his house the evening of September 20th, and the woman introduced Newton as her husband, saying that he had just come from Chicago and wanted "to pay up my insurance;" that Davis inquired if she was Mrs. Newton and she replied, "Yes." Davis says that he computed the amount necessary to reinstate the policy and received the same from Newton; that the woman signed an application for the reinstatement

and the payment to the agent of any such amount shall be at the  
 sole risk of the person making such payment and shall not be  
 provided as a payment upon the policy, whether received or given  
 for such payment or not." It was also provided that if the policy  
 became void in consequence of non-payment of premium it might be  
 revived, it not more than thirty-two months are due, "upon payment  
 of all arrears and the presentation of evidence satisfactory to the  
 company of the good health of the insured." Then, when the ap-  
 plicant was made by plaintiff to have the policy revived it had  
 already lapsed for some months past, and, however, it revived  
 if the insured complied with the conditions named in the policy.  
 On the evening of September 20, 1900, plaintiff, with Mrs.  
 Davis, a sister of the insured, called at the home of a Mr. Davis,  
 who is described as an "insurance agent" for the defendant company.  
 Plaintiff testified that he said Davis that he came to reinstate  
 Defendant's policy, and that Davis told him that it would take \$5.00  
 to reinstate it, and he paid \$5.00. "That is not correct,"  
 and plaintiff replied, "There is in the hospital;" "That Davis said,  
 "What hospital?" Defendant's witness replied, "The University Hospital  
 in Toledo," and Davis said, "For \$5.00 I will reinstate the policy;"  
 that plaintiff then gave Davis this amount of money and the same was  
 entered in the weekly premium receipt book which plaintiff had in  
 his possession. Plaintiff thereupon returned to Chicago.  
 Davis testified that plaintiff and a woman came to his house  
 the evening of September 20th, and the woman introduced herself as  
 his wife, saying that he had just come from Toledo and wanted  
 "to pay on my insurance;" that Davis indicated to her that she  
 was not his wife, and she replied, "Yes." Davis says that he consulted the  
 amount necessary to reinstate the policy and received the same from  
 Davis; that the woman signed an application for the reinstatement



of the insurance, signing the name, "Josephine Newton." After they left, Davis, who had not seen Mrs. Newton for about two years, said that he remembered that she stuttered and that she was much heavier than the woman who posed as Mrs. Newton; that the following day he went to the neighborhood where Mrs. Newton had lived, made some inquiries, and then was told by a neighbor that Josephine Newton was in the Maternity hospital; that he then hunted up her sister, Mrs. Ross, who had posed as Mrs. Newton, and reproached her for "posing as your sister," to which Mrs. Ross only said, "Yes, I know;" that Davis told her that the company could not "go ahead with that," that "people can't revive insurance when they are ready to die;" he then inquired where the man was who was with her - that he wanted to give the money back to him and cancel the transaction, and was told by Mrs. Ross that he had gone right back to Chicago. Mrs. Newton and her sister are colored people and Davis said that five of them lived in one block in Toledo and that it was very difficult to keep track of them; that "they just doubled up among one another;" that he had known Mrs. Ross when he collected premiums from her in 1925, but did not know her when she called in the evening of September 20th; that he did not return the money to plaintiff because he had left Toledo; that he asked Mrs. Ross for Newton's Chicago address but was told by her that she did not know what it was. Davis testified that on the 21st or 22nd he called up the doctor at the Maternity hospital and reported the matter to the manager and the cashier of defendant's Toledo office and gave to the cashier the money he had received from Newton.

Mrs. Ross testified in rebuttal on behalf of the plaintiff. No questions were asked her concerning her posing as Mrs. Newton when she interviewed Davis, and she made no denial of his version of what happened on this occasion; she denied that anything was

at the moment, along the same, "Chicago Street." After they left, Davis, who had not seen Mrs. Newton for about two years, said that he remembered that she visited and that she was much heavier than the woman who passed as Mrs. Newton; that the following day he went to the neighborhood where Mrs. Newton had lived, made some inquiries, and there was told by a neighbor that Josephine Newton was in the Maternity Hospital; that he then hunted up her sister, Mrs. Ross, who had passed as Mrs. Newton, and requested her for "seeing on your sister," to which Mrs. Ross only said, "Yes, I know;" that Davis told her that the company would not "be shared with that," that "people can't receive insurance when they are ready to die;" he then inquired where the man was who was with her - that he wanted to "give the money back to him and cancel the transaction, and was told by Mrs. Ross that he had gone right back to Chicago. Mrs. Newton and her sister are collected now and Davis said that five of them lived in one block in Toledo and that it was very difficult to keep track of them; that "they just divided up among one another;" that he had known Mrs. Ross when he collected premiums from her in 1925, but did not know her when she called in the evening of September 30th; that he did not return the money to plaintiff because he had left Toledo; that he asked Mrs. Ross for Newton's Chicago address but was told by her that she did not know what it was. Davis testified that on the day or when he called up the doctor at the Maternity Hospital and reported the matter to the manager and the cashier of defendant's collection and gave to the cashier the money he had received from her.

Mrs. Ross testified in rebuttal on behalf of the plaintiff. No questions were asked her concerning her going as Mrs. Newton - she testified Davis, and she made no denial of his version of what occurred on this occasion; she denied that anything was

said at that meeting concerning the condition of Mrs. Newton's health, thus directly contradicting plaintiff's testimony in this respect.

Mrs. Davis, wife of William Davis, who was present at the interview the evening of September 20th, testified that when Mrs. Ross came in she introduced plaintiff, Mr. Newton, to Mr. Davis as her husband; the witness heard no conversation to the effect that Mrs. Newton was sick in the hospital; she said that the parties were present in their home about ten or fifteen minutes.

Plaintiff testified that Josephine Newton died in Toledo, Ohio, September 29, 1930; that about October 3rd he surrendered the policy with proof of death, and the receipt, to Mr. Harrington, defendant's agent in Chicago, who told plaintiff that in about two weeks he, Harrington, would notify him; plaintiff called again at Harrington's office October 23th and was told that the company refused to pay upon the policy, and the revival premium paid was tendered to plaintiff, who refused it.

This record is barren of any proof as to what caused the death of Mrs. Newton. The witnesses and the attorneys refer to the proofs of death which were introduced in evidence in the other case, No. 37044, but no proof of death or claimant's statement is in the present record.

Reduced to its simplest elements, and considering only the evidence in the present record, we have a case where, through fraud and misrepresentation, an agent of the defendant was induced to accept premiums to revive a lapsed policy while the insured was in a hospital and died shortly thereafter.

The express provision of the policy was, that the agent had no authority to reinstate a lapsed policy and that any payment made to an agent should be at the sole risk of the person making the payment and should not be credited as a payment upon the policy,



void as that meeting concerning the condition of Mrs. Newton's health, since directly contradicting Elizabeth's testimony in this regard.

Mrs. Davis, wife of William Davis, was present at the interview the evening of September 28th, testified that when Mrs. Howe came in she introduced Elizabeth, Mr. Newton, to Mr. Davis as her husband; the witness heard no conversation in the office that Mrs. Newton was also in the hospital; she said that the parties were present in their home about ten or fifteen minutes.

Elizabeth testified that following her visit to Toledo, Ohio, September 28, 1930; that about October 2nd he encountered the policy with proof of death, and the receipt, to Mr. Harrington, defendant's agent in Chicago, who told Elizabeth that in about two weeks Mr. Harrington, would notify him; Elizabeth called again at Harrington's office October 2nd and was told that the company intended to pay upon the policy, and the revised premium bill was forwarded to Elizabeth, who retained it.

This record is part of any proof as to what caused the death of Mrs. Newton. The witness and the attorneys refer to the proofs of death which were introduced in evidence in the other case, No. 27044, and no proof of death or claimant's statement in the present record.

Reduced to its simplest elements, and considering only the witness in the present record, as there is some other, through fraud and misrepresentation, an agent of the defendant was induced to deliver a policy to the insured with the insured was a contract and that contract was valid.

The express provision of the policy was, that the agent had no authority to terminate a lapse policy and that any payment made to an agent should be at the sole risk of the person making the payment and should not be credited as a payment upon the policy.

except as evidenced by the signature of the president or secretary of defendant. Davis therefore had no power to reinstate the policy.

Moreover, the policy provided, as one of the conditions of revival, that evidence of the sound health of the insured must be presented. Certainly Mrs. Newton, virtually upon her death bed when the arrears of premium was paid to Davis, could not be said to be in sound health. In Randcock v. Anigats of Security, 303 Ill. 66, a misrepresentation was defined as a statement of something as a fact which is untrue and material to the risk, the person making the statement knowing it to be untrue, in an attempt to deceive. This is applicable to the present case.

Plaintiff argues that defendant, by not acting promptly after Davis paid in the money received by him to the Toledo office and reported the conditions, waived the conditions for revival named in the policy. One answer to this is the fact that the address of plaintiff was unknown to the Toledo office and that attempts to ascertain it failed. No claim on the policy was made through the issuing office at Toledo, but was made through a Chicago office which knew nothing about the transaction. When the claim reached New York from Chicago it is reasonable to assume that the New York office would make an investigation as to the facts through the Toledo office. Under such circumstances we cannot concede that so great a period of time elapsed between the date plaintiff filed his claim and the date when he was informed that the company refused to pay upon the policy as to amount to a waiver of defendant's right to refuse to approve the revival of the policy.

On the evening of September 20th Davis gave a receipt for the revival of the policy involved in case No. 37044, and also a revival application in connection with that policy. Both of these documents are in the present record. The court instructed the jury that they had no direct bearing upon the issues in this case and

except as evidenced by the signature of the president or secretary of defendant. Davis therefore had no power to reinstate the policy. However, the policy provided, as one of the conditions of revival, that evidence of the sound health of the insured must be presented. Certainly Mrs. Norton, although upon her death bed when the terms of premium were paid to Davis, could not be said to be in sound health. In Reynolds v. American Life Ins. Co., 111 F.2d 80, a misrepresentation was defined as a statement of something as a fact which is untrue and material to the claim, the person making the statement knowing it to be untrue, in an attempt to deceive. This is applicable to the present case. Plaintiff argues that defendant, by not acting promptly after Davis told him the policy was in the hands of the Toledo office and reported the conditions, waived the conditions for revival named in the policy. The answer to this is the fact that the advice of plaintiff was unknown to the Toledo office and that attempt to rescind it failed. No claim on the policy was made through the Toledo office at first, but was later forwarded to Chicago office which knew nothing about the transaction. When the claim reached New York from Chicago it is reasonable to assume that the New York office would make an investigation as to the facts through the Toledo office. Under such circumstances we cannot conceive that so great a period of time elapsed between the date plaintiff filed his claim and the date when he was informed that the company refused to pay upon the policy as to amount to a waiver of defendant's right to refuse to approve the revival of the policy. On the evening of September 26th Davis gave a receipt for the revival of the policy issued in case No. 37044, and also a revival application in connection with that policy. Both of these documents are in the present record. The court instructed the jury that they had no direct bearing upon the issues in this case and



were admitted only for the purpose of explaining what took place at this interview in Mr. Davis' home. Davis testified that it was not necessary to have more than one application for revival, as the same examination that would do to revive one policy would revive the other policy. In other words, the one application was understood to apply to both policies, so that the instruction of the court in this respect was incorrect.

The instructions were calculated to mislead the jury in implying that Davis was a general agent, having authority to waive conditions in the policy, and had or should have had knowledge as to the condition of Josephine Newton's health, and that with such knowledge he accepted payment of premiums in arrears and transferred the same to the defendant company, who retained the same; that if the jury should so find, then "as a matter of law it should find the issues for the plaintiff." We find no instructions referring to or touching upon the alleged impersonation of the insured by her sister and the misrepresentation as to the facts of the insured's health.

For the reasons that the verdict is against the manifest weight of the evidence, that the verdict should have been for the defendant, and that the instructions tended to mislead the jury, the judgment is reversed and the cause remanded.

If there should be another trial, these cases, numbered 37044 and 37045 in this court, should be consolidated in the trial court for hearing so that there may be only one trial.

REVERSED AND REMANDED.

O'Connor, J., concurs.

MR. PRESIDING JUSTICE MATHENET Dissenting: For the reasons stated in the dissenting opinion in No. 37044, which was this day filed, here, as there, I respectively dissent.

was decided only by the nature of evidence that was  
as this evidence is not, under the law, admissible  
not necessary to have been an admission for evidence, as  
the same conclusion that would be to rely on policy would  
leave the other policy. In other words, the conclusion was  
understood to apply to both policies, so that the inclusion of  
the party in this respect was intended.

The intention was intended to include the party in  
including that party and a general agent, having authority to write  
conditions in the policy, and that or should have been provided as  
to the condition of January 1904's death, and that with such  
knowledge he accepted payment of premium in advance and from-  
ward the case to the defendant company, who returned the same;  
that it was fairly to be said, "as a matter of fact it should  
find the issue for the plaintiff." It found no intention relat-  
ing to or covering upon the alleged inclusion of the insured  
by her sister and the misrepresentation as to the facts of the in-  
sured's death.

For the reasons that the verdict is against the plaintiff  
weight of the evidence, and the verdict should have been for the  
defendant, and that the insurance should be allowed the jury.  
The judgment is reversed and the case remanded.

It should be noted that, these cases, mentioned  
1904 and 1905 in this court, should be consolidated in the trial  
court for hearing so that there may be only one trial.

REVEREND AND HONORABLE

St. Louis, Mo., January 1, 1906.

MR. JAMES H. LAMBERT, Plaintiff: For the reasons stated  
in the preceding opinion in No. 1704, which was this day filed,  
I hereby certify that

37821

ELLEN GRIFFIN,  
Appellee,

vs.

AGAR PACKING AND PROVISION COMPANY,  
a Corporation,  
Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

274 I.A. 662<sup>4</sup>

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing an action in assumpsit upon a promissory note made by defendant, upon trial by the court had judgment for \$526.25, from which defendant appeals.

The note sued on was one of a series executed by defendant and secured by a deed of trust conveying certain real estate. Defendant says that the note and trust deed should be construed together as parts of the same contract, and that a provision of the trust deed prohibits any bondholder bringing any suit at law on any bond or coupon held by him, and that this right is vested exclusively in the trustee.

This is the familiar "No-Action" clause which the courts have had occasion to consider in several cases. Filinger v. Broadway Trust & Savings Bank, 351 Ill. 170; Sturgis National Bank v. Harris Trust & Savings Bank, 351 Ill. 465. In these cases it was held that while a bond and trust deed securing the same will be construed together wherever the question as to the nature of the actual transaction becomes material, this does not mean that the mortgage will be incorporated into the note, and the holder of the note may disregard the mortgage entirely and sue and recover on the note. In the recent case of Cowanza v. Kengler & Mandell, Inc., 273 Ill. App. 239, this court considered the proposition now presented. After reviewing the cases in point, we held that the promise to pay was unconditional and that the provisions in the note referring to the trust deed relates to the security and the



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manner of proceeding against this security. Following the reasons stated in these cases, we hold in the instant case that the plaintiff could properly commence her suit at law on the bond.

Defendant claims it was error on the part of the trial court to sustain an objection to the admission of the trust deed and also sustain an objection to the offer of some oral testimony with relation to whether or not notice had been served by the bondholder on the trustee to take action on the trust deed. The court properly excluded this evidence. For the reasons we have indicated the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

number of proposed amendments were made. Following the testimony  
stated in these cases, we held in the instant case that the plain-

tiff could properly commence her suit as law on the bond.

Defendant claims it was error on the part of the trial

court to sustain an objection to the admission of the trust deed  
and also sustain an objection to the offer of some oral testimony

with relation to whether or not notice had been served by the  
bondholder on the trustee to take action on the trust deed. The  
court properly excluded this evidence. For the reasons we have

indicated the judgment is affirmed.

ATTEST:

Notary Public, J. J. Connor, J. J. Connor.



PEOPLE OF THE STATE OF ILLINOIS,  
Defendant in Error,

vs.

JUAN HAND,  
Plaintiff in Error.

ERROR TO CRIMINAL COURT  
OF COOK COUNTY.

274 I.A. 663

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this writ of error the defendant seeks the reversal of a judgment in the Criminal court finding him guilty of nonsupport of his wife and ordering him to pay \$7 a week to her.

Defendant was charged with having violated the statute (Criminal Code) Chap. 38, para. 2, sec. 1, which provides: "That every person who shall, without any reasonable cause, neglect or refuse to provide for the support or maintenance of his wife, said wife being in destitute or in necessitous circumstances, \*\*\* shall be deemed guilty of a misdemeanor \*." The statute also provides that when a fine is imposed it may be directed by the court to be paid, in whole or in part, to the wife for a term not exceeding one year. Para. 5, sec. 1, Illinois Statutes (Cahill).

Like any other criminal case, before a conviction can stand in this case the evidence must prove the guilt of the defendant beyond a reasonable doubt. This case was tried by the court, and we hold that the evidence failed to meet the required degree of proof.

Juan Hand, the defendant, and Mary A. Hand were married in 1898; they had no children, but two nieces of defendant lived with them from childhood at the residence owned by defendant in Blue Island, Cook county, Illinois.

Defendant is a railroad engineer, working for the Chicago, Rock Island & Pacific Railroad, and in about the year 1916 was transferred from the Chicago district to Peoria; defendant subsequently requested Mrs. Hand to come to Peoria and live with him,

STATE OF ILLINOIS  
 DEPARTMENT OF JUSTICE

CHARGE TO CRIMINAL JUSTICE

OF CRIMINAL JUSTICE

274 I.A. 663

STATE OF ILLINOIS  
 DEPARTMENT OF JUSTICE

CHARGE TO CRIMINAL JUSTICE

By this writ of error the defendant seeks the reversal of a judgment in the Criminal Court finding him guilty of kidnapping of his wife and ordering him to pay \$7 a week to her.

Defendant was charged with having violated the statute

(Criminal Code) Chap. 38, Sec. 1, which provides: "That

every person who shall, without any reasonable cause, neglect or

refuse to provide for the support or maintenance of his wife, said

wife being in destitute or in necessitous circumstances, shall

be deemed guilty of a misdemeanor."

That when a fine is imposed it may be levied by the court to be

paid, in whole or in part, to the wife for a term not exceeding

one year. Sec. 1, Chap. 38, Criminal Code.

Like any other criminal case, before a conviction can stand

in this case the evidence must prove the guilt of the defendant be-

yond a reasonable doubt. This case was tried by the court, and we

hold that the evidence failed to meet the required degree of proof.

John Dunn, the defendant, and Mary A. Dunn were married in

1896; they had no children, but two sisters of defendant lived with

them from childhood at the residence owned by defendant in this

city, Cook County, Illinois.

Defendant is a railroad engineer, working for the Chicago,

Rock Island & Pacific Railroad, and in about the year 1914 was

transferred from the Chicago district to Pacific Northwest where

recently requested Mrs. Dunn to come to Pacific and live with him.

and though she promised to do this she never did so but remained in the home at Blue Island. During the first two years that defendant lived in Peoria he and his wife at certain times looked for a house there where they might live and selected one with which Mrs. Hand was apparently satisfied; however, she did not come to Peoria and told defendant that she would move to Peoria as soon as the older niece was through school; defendant again asked Mrs. Hand to come to Peoria to live with him but she refused; two witnesses testified that she gave as a reason that she did not think Peoria was a fit place for girls to live.

Subsequently Mrs. Hand instituted <sup>a</sup>divorce proceeding at Peoria, Illinois. The record does not disclose what became of this suit but apparently she did not obtain a decree. Defendant was subsequently transferred by his employer to Joliet, Illinois, where he worked as a switch engineer. Mrs. Hand instituted another divorce proceeding against defendant in Joliet in the summer of 1932, charging desertion; upon the hearing of the second divorce suit she was denied a divorce; apparently she then agreed to go to Joliet to live with her husband.

During all these years Mrs. Hand was living in defendant's house in Blue Island with the two nieces, who in the meantime had arrived at maturity; one of them, thirty-two years old, was married at the time of the trial and her husband also lived with Mrs. Hand in the Blue Island residence. Mrs. Hand supported herself by keeping boarders, and there is no evidence that she ever asked the defendant for money.

The occasion for the rupture between the husband and wife was his unwillingness to continue the support of the two nieces and the husband of one of them.

After the termination of the second divorce proceeding Mrs. Hand went with the married niece to Joliet; apparently the niece



and through the process to be into the matter did so but remained in the home at Pine Island. During the first two years that defendant lived in Tampa he and his wife at certain times lived in a house there where they might live and collected one with which Mrs. Hand was apparently satisfied; however, she did not seem to be satisfied with defendant when she would move to Florida as soon as the other niece was through school; defendant again asked Mrs. Hand to come to Florida to live with him and was refused; the witnesses recalled that she gave as a reason that she did not think Florida was a fit place for him to live.

Subsequently, Mrs. Hand testified that defendant at Florida, Illinois. The record does not disclose what became of this suit but apparently she did not obtain a divorce. Defendant was subsequently transferred by his employer to Joliet, Illinois, where he worked as a switch engineer. Mrs. Hand testified another divorce proceeding against defendant in Joliet in the summer of 1932, charging desertion; upon the hearing of the second divorce suit she was granted a divorce; apparently she then agreed to go to Joliet to live with her husband.

During all these years Mrs. Hand was living in defendant's home in Pine Island with the two nieces, who in the meantime had arrived at maturity; one of them, thirty-two years old, was married at the time of the trial and her husband also lived with Mrs. Hand in the Pine Island residence. Mrs. Hand testified that in the meantime, and there is no evidence that she ever asked the defendant for money.

The occasion for the dispute between the husband and wife was his unwillingness to continue the support of the two nieces and the husband of one of them. After the termination of the second divorce proceeding Mrs. Hand went with the married niece to Joliet; apparently the niece

was denied admission to the place where defendant lived and they returned to Blue Island. Shortly thereafter Mrs. Hand had defendant arrested, charging him with nonsupport, and this criminal proceeding followed.

The evidence fails to show that defendant ever refused to support his wife. On the contrary he repeatedly requested she should come and live with him, both in Peoria and Joliet. We think he very properly might refuse to support the niece and the husband.

Mrs. Hand could not refuse to live with her husband in Peoria or Joliet, the places of his employment, and maintain a criminal prosecution charging him with nonsupport. A husband is obliged to support his wife only at his domicile and not at such place as she may choose to live. The People v. Howell, 214 Ill. App. 372.

Attention is called to the irregularity in the judgment in that it does not limit the time of weekly payments to one year, as prescribed by the statute. This would necessitate a reversal and remandment in order to have the judgment corrected.

However, we hold that the evidence failed to prove defendant guilty of the charge and the judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

was denied admission to the place where defendant lived and they  
 returned to their home. Defendant was then arrested and taken  
 and arrested, charging him with non-support, and also criminal  
 conversation.

The evidence fails to show that defendant ever refused to  
 support his wife. On the contrary he repeatedly requested she  
 should come and live with him, both in Paris and Jersey. We  
 think he very properly might refuse to support his wife and  
 the husband.

Mr. Hand could not refuse to live with her husband in  
 Paris or Jersey, the place of his employment, and maintain a  
 criminal prosecution charging him with non-support. A husband is  
 obliged to support his wife only at his domicile and not at such  
 place as she may choose to live. The People v. Howell, 114 Ill.

100, 372.

Attention is called to the irregularity in the judgment  
 in that it does not limit the time of weekly payments to one year,  
 as prescribed by the statute. This would necessitate a reversal  
 and remandment in order to have the judgment corrected.

However, we hold that the evidence failed to prove de-  
 fendant guilty of the charge and the judgment is therefore  
 reversed and the cause remanded.

REVEREND HIS HONOR.

Metzger, C. J., and O'Connor, J., concur.



37338

SALVATORE GENUALDI and VIRGINIA  
GENUALDI,

Appellees,

vs.

METROPOLITAN LIFE INSURANCE  
COMPANY, a Corporation,  
Appellant.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

274 I.A. 663<sup>2</sup>

MR. JUSTICE McSURNELY DELIVERED THE OPINION OF THE COURT.

Plaintiffs were named as beneficiaries in a life insurance policy issued by defendant on the life of their daughter, Mamie Genualdi; upon the death of insured defendant declined to pay the amount of the policy and this suit followed; upon trial by a jury plaintiffs had a verdict for \$2850, and defendant appeals from the judgment.

We are constrained to reverse the judgment for the reason the evidence shows that the policy was procured through a misrepresentation of the condition of insured's health at the time the application for the policy was signed and the policy issued.

August 29, 1930, Rose Genualdi, a sister of the insured, died of tuberculosis at the Municipal Tuberculosis Sanitarium. Mamie Genualdi lived with her parents and her brother Thomas at 626 Hobbie street, Chicago; Thomas was in the life insurance business, an agent for the Globe Life Insurance Company; September 8, 1930, which would be about ten days after the sister died of tuberculosis, Mamie went to the office of Dr. Corbett with her mother and her brother Thomas; she was there examined by Dr. Corbett, who found that she had pulmonary tuberculosis in both apices of the lungs; that she had moist rales, indicating pulmonary tuberculosis; she was coughing quite profusely; the Doctor told the mother and brother she was suffering from tuberculosis; he then ordered that she be taken to the Municipal Tuberculosis

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Dispensary for an X-ray; September 11th Mamie went to the Municipal Tuberculosis Dispensary.

Apparently under the guidance of her brother Thomas, Mamie, then eighteen years of age, signed an application for an insurance policy on September 22, 1930. It is significant that this application was not made to the life insurance company of which Thomas was an agent, but was made to the defendant. October 10th written questions were propounded to Mamie Genualdi by the medical examiner of the defendant company, to which she made answers. Among these questions she was asked if she had ever had consumption or disease of the lungs, or had been attended by a physician within the last five years or had any treatment during this time at any dispensary, hospital or sanatorium. To each of these questions she answered "No." She gave her present condition as "good," and to the question, "When last sick?" answered "Never." To the question whether she had any physical infirmity she answered "No." And to the question whether she had resided or had been intimately associated with any persons suffering from consumption, she answered "No." And to the question whether any of her parents, brothers or sisters had ever had tuberculosis, she answered "No." The application contained the provision as follows:

"It is understood and agreed that the foregoing statements and answers are correct and wholly true, and, together with the answers and questions on Part B hereof, they shall form the basis of the contract of insurance if one be issued."

She also answered to the request to give her family record, stating that she had no living sisters but two sisters had died in infancy. The policy was issued October 10th and she died of tuberculosis on February 22, 1931, a little over four months after the policy was issued. Neither the father nor mother, the plaintiffs, testified upon the trial; the brother, Thomas, testified that the premium on the policy was paid by him from his "own



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and Tuberculosis Laboratory.

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personal money." There was no denial of Dr. Corbett's testimony that Marie was suffering from tuberculosis on September 8th.

It was a misrepresentation for the insured to deny that she had resided within the past year with any person suffering from consumption, and that she never had any sister who had tuberculosis. The sister Rose, who was four years older than Marie, resided in the same home with her, with their parents.

Counsel for plaintiffs argue that the word "attended" by a physician in the application does not mean a mere calling at a doctor's office for relief from some slight indisposition, citing certain cases to this effect. Certainly a diagnosis of tuberculosis was a serious condition, and good faith required the disclosure of the fact that she had been examined and her illness diagnosed as tuberculosis.

Moreover, the insurer does not expect the insured to be the judge of whether or not her physical condition is serious. The insurer has the right to know whether the insured has had occasion to consult a physician for any reason whatsoever so that the insurer might consult any physician consulted by the insured. This is the rule as applied in the recent case of Perkins v. Prudential Insurance Co., decided by the United States Circuit Court of Appeals for the Seventh Circuit, case No. 4979.

We cannot agree with the assertion that there is no evidence that the insured resided with or even saw her sister Rose during the year preceding the date of the application. As we have already noted, they lived together in the same home.

The brief on behalf of plaintiffs is more ingenious than convincing. As Marie Gensfeldt did not make a truthful disclosure of the facts to the defendant company, but on the contrary misrepresented them by giving false answers, it follows that this judgment

physician, Dr. J. H. Jones, of St. Louis, Mo.

that Jones was not a physician, but a layman.

It was a physician, however, who was not a layman.

one had visited with the case with any person suffering

from consumption, and that the doctor had any power to

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cannot stand.

At the close of all the evidence the defendant moved that the court instruct the jury to bring in a verdict for the defendant, which motion was refused. In a number of cases involving facts like those before us, the courts of review have ruled that such a motion should have been allowed. Bishofski v. Metropolitan Life Ins. Co., 237 Ill. App. 220; Cohen v. New York Life Ins. Co., 256 Ill. App. 345; Crosse v. Agents of Henry, 254 Ill. 60.

Upon the trial defendant tendered to plaintiff \$25.90, the amount of premiums paid, which plaintiff refused. Plaintiff is entitled to recover this amount.

The judgment is reversed with a finding of fact, and judgment for plaintiff for \$25.90 is entered in this court.

REVERSED WITH FINDING OF FACT  
AND JUDGMENT HERE.

Matchett, P. J., and O'Connor, J., concur.

#### FINDING OF FACT.

We find as a fact that the policy upon which plaintiffs are suing was procured by fraud and misrepresentation, and therefore is not enforceable.

James Brown

At the close of all the evidence the defendant moved that the court instruct the jury to find in a verdict for the defendant, which motion was refused. In a number of cases involving facts like those before us, the courts of review have ruled that when a motion would have been allowed, James v. Commonwealth, 1882, 24, 327 131. App. 32; James v. Commonwealth, 1882, 24, 327 131. App. 32; James v. Commonwealth, 1882, 24, 327 131. App. 32. Upon the trial before me the defendant was convicted as charged. The amount of damages paid, which was \$100.00, was allowed in writing to the defendant. The judgment is reversed with a finding of fact, and judgment for plaintiff for \$100.00 is entered in this court. THE COURT WITH REASON OF FACT AND REASONABLE DUBIUM.

Witness, J. J. and J. Brown, J. J. Brown.

Witness in Court.

We find on a fact that the policy upon which plaintiff's was being was issued by the defendant, and therefore is not enforceable.

37387

EMMA MARTIN,

Appellee,

vs.

EVANS FUR COMPANY, a Corporation,  
A. L. MELTZER, M. M. MELTZER,  
H. EVANS and C. LEIDY,  
Appellants.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

274 I.A. 663<sup>3</sup>

MR. JUSTICE MCGOUGH DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit claiming a conversion by defendants of a fur coat belonging to her, and upon trial by the court had a judgment for \$75, from which defendants appeal.

The defendants are in the fur garment business. Plaintiff testified that she went to their place of business to have a fur scarf cleaned; they solicited her to buy a new fur coat, offering to take her old fur coat, which she was wearing, in partial exchange and credit her with \$50 for the old coat, the balance of the price of the new coat to be paid in partial installments, the new coat not to be delivered until payments were completed; she agreed with this but on condition that should she not be able to meet the payments on the new coat the sale would be called off and her old coat returned to her. She testified that defendants, through Mr. Meltzer, president of defendant company, and a Miss Leidy, a sales woman, agreed to this. Defendants permitted plaintiff to wear her old coat for a time, then she left the old coat with them; subsequently, finding that she could not keep up the payments for the new coat, she so notified the defendants and asked for the return of the old coat, which was refused. Plaintiff's testimony was corroborated by her sister, who testified that she was present at the time and heard defendants say that if plaintiff could not make the payments on the new coat they would return the old one. Defendant A. L. Meltzer testified, in substance denying the agreement to return



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of a few feet belonging to him, and upon trial by the court had a

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testified that she went to the place of business to have a new coat made; they solicited her to buy a new coat, offering to take her old coat, which she was wearing, in partial payment and credited her with \$50 for the old coat, the balance of the price of the new coat to be paid in partial installments, the new coat not to be delivered until payments were completed; she agreed with this but on condition that should she not be able to meet the payments on the new coat the suit would be called off and her old coat returned to her. She testified that defendant, through Mr. Walker, president of defendant company, was a white lady, a white woman, appeared to him. Defendant admitted plaintiff to wear her old coat for a time, then she left the old coat with them; subsequently, finding that she could not keep up the payments for the new coat, she so notified the defendant and asked for the return of the old coat, which was refused. Plaintiff's testimony was corroborated by her sister, who testified that she was present at the time and heard defendant say that if plaintiff could not make the payments on the new coat they would return the old one. Defendant A. L. Walker testified, in substance denying the agreement to return

the old coat to her.

In this court defendants argue that the old coat was received by defendants in part payment for the new garment, and deny any agreement to return it.

The case turns upon the credibility of the witnesses. The trial court heard them and is better qualified than we are to judge of their credibility. We cannot say that his conclusion to accept the story of the plaintiff and her witness is manifestly against the greater weight of the evidence.

The judgment is therefore affirmed.

AFFIRMED.

Hatchett, P. J., and O'Connor, J., concur.

the old case to her.

In this court testimony shows that the old case was re-

acted by testimony in part payment for the new payment, and

they are agreement to return it.

The case arose upon the credibility of the witnesses. The

trial court heard them and in better qualified than we are to

judge of their credibility. We cannot say that his conclusion

to accept the story of the plaintiff and her witness is manifestly

against the greater weight of the evidence.

The judgment is therefore affirmed.

WITNESSES

Witnesses, J. J., and O'Connor, J., present.



37136

FRED OSER et al.,  
Appellants,

vs.

THOMAS E. MALOY et al.,  
Appellees.

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

274 I.A. 663<sup>4</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the complainants seek to reverse a decree of the Superior court of Cook county dismissing their bill of complaint for want of equity.

January 19, 1933, complainants, who allege that they are members of the Chicago Moving Picture Machine Operators' Union, Local No. 119, a voluntary association, and also members of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, also a voluntary association, filed their second amended bill on behalf of themselves and all other members of the unions who might choose to join with them, against the defendants, all of whom (except three who were city employees) are alleged to be officers and agents of the unions, charging them with illegally conspiring to attempt to oust them from the unions and who excluded them from the benefits of the unions. They also charged the defendants with other alleged wrongdoings which will be hereinafter referred to, and prayed for an injunction, the appointment of a receiver, for an accounting, and other relief.

February 6, 1933, two defendants, employees of the City, filed their general demurrer. February 9th the other defendants filed their joint and several answer, denying the charges of wrongdoing made against them and setting up what they designate as "matters of affirmative defense." February 11, 1933, complainants moved for a temporary injunction and an order was entered continuing the action to February 16, 1933. February 17, 1933, complain-

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of the Superior Court of New Jersey Atlantic County filed July 27,  
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January 19, 1968, commencing, one single day and members of the Chicago Youth Picture Machine Operators Union, Local No. 110, a voluntary association, and also members of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators - an United Brotherhood of Carpenters and Joiners of America.

Three who were city employees) were allowed to be citizens and members to join with them, against the Government, all of whom (except of themselves and all other members of the nation who might oppose a voluntary association, that their second meeting will be held

injection, the application of a receiver, for an emergency, and  
strongly which will be immediately referred to, and proper for an  
of the union. They also changed the telephone with other alleged  
to cost them from the union and was concluded from the building  
at the union, strongly with illegal movement to prevent

On the morning of February 12, 1942, the writer was informed by the Chief of the Bureau of Investigation, Washington, D. C., that the following information had been received from the Bureau of Investigation, New York City:

ants filed their replication to the answer of the defendants. February 21st an order was entered upon motion of the complainants, with the consent of the corporation counsel, dismissing the bill as to Joseph Maloy and A. W. Jackson, city employees. March 6th complainants, by leave of court, amended their second amended bill. July 12, 1933, an order was entered on motion of the complainants suggesting the death of complainant, Fred Oser, and substituting Gladys Oser, as his administratrix. August 11, 1933, complainants moved for a temporary injunction and the defendants made a counter motion that the bill be dismissed "for want of equity and jurisdiction in the Court," for the reasons set forth in defendants' answer as matters of affirmative defense. The defendants' motion was allowed, the bill dismissed and this appeal followed.

The procedure followed in this case, of dismissing complainants' second amended bill after issue was joined by defendants' answer and plaintiff's replication thereto, is anomalous and is not to be approved.

Defendants contend that their oral motion to dismiss the bill for want of equity and for lack of jurisdiction was in legal effect a demurrer ore tenus. But the law is that a demurrer ore tenus will not be allowed unless there is a demurrer on record. 1 Goss's Puterbaugh Ch. Pl. & Pr., 7th ed., page 133. While the procedure was irregular, we prefer to decide the questions on their merits. The matters alleged in the answer are not to be considered, but the only question is whether the complainants state a cause of action in their bill of complaint.

The allegations of the bill, so far as it is necessary to state them, are that complainants were members of the Chicago Moving Picture Machine Operators' Union Local No. 110, and members of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada,



into filed their replies to the answer of the defendants.  
February 21st an order was entered upon motion of the complainants,  
with the consent of the corporation counsel, dismissing the bill as  
to Joseph Kelly and A. W. Jackson, city employees. March 28th com-  
plainants, by leave of court, amended their second amended bill.  
July 18, 1933, an order was entered on motion of the complainants  
suggesting the bench of complainant, Fred West, and substituting  
Chicago Corp. as his substitute. August 11, 1933, complainants  
moved for a temporary injunction and the order was made a permanent  
motion that the bill be dismissed "for want of equity and justice."  
Motion in the Court. For the reasons set forth in defendants'  
answer as matters of alternative defense. The defendants' motion  
was allowed, the bill dismissed and this appeal followed.  
The procedure followed in this case, of dismissing com-  
plainants' second amended bill after issue was joined by defendants,  
answer and plaintiff's replication thereto, is anomalous and is not  
to be approved.  
Defendants contend that their own motion to dismiss the  
bill for want of equity and for lack of jurisdiction was in fact  
effect a demurrer erga omnes. And the law is that a demurrer erga  
omnes will not be allowed unless there is a demurrer on record.  
A House's Committee on the Judiciary, Vol. 1, 1931, page 144. While the  
procedure was irregular, we prefer to decide the question on  
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considered, but the only question is whether the complainants  
state a cause of action in their bill of complaint.  
The allegations of the bill, so far as it is necessary to  
state them, are that complainants were members of the Chicago  
Moving Picture Machine Operators' Union Local No. 110, and members  
of the International Alliance of Theatrical Stage Employees and  
Moving Picture Machine Operators of the United States and Canada,

and therefore entitled to the privileges and benefits of the union, some of which are a fair rate of wages, assurance of competent apprentices, election of officers and members in accordance with the constitution and by-laws of the union, the exclusion of non-members from the union, death benefit of \$2,000, sick benefit of \$30 a week if incapacitated, etc. The bill further alleged that there were 496 members of the local union, that 500 persons were working in the moving picture business who were not members of the union but who were known as "Permit Men", having wrongfully been given permits by officers of the union without any examination of the applicant; that continuously since 1920, the defendants conspired with other unknown persons to violate the constitution and by-laws of the local union for the purpose of obtaining and maintaining control of the union for the benefit of the defendants, and permitting them fraudulently to exploit the union and to convert its assets to their own use; that in furtherance of such conspiracy the defendants in 1925, 1927 and 1932 conducted unfair elections so that they could continue in control of the union for their own benefit; that to accomplish this result they employed gunmen who intimidated the members of the union by threats so that there was not a free or fair election of officers by the members; that they, by intimidation and threats, perpetuated themselves in office and control of the union, employing gunmen for this purpose and threatening anyone who dared to seek any office without their favor; that defendants, in furtherance of the conspiracy, issued licenses authorizing persons to operate moving picture machines who were wholly unqualified; that they also issued "Permits" permitting others to do the work of union men for their own benefit; that in 1931, defendants received \$100,000 to combat a lock-out by the Allied Theatre Owners Association but refused to account for this money; that defendants also refused to account for other

and therefore entitled to the privilege and benefits of the union,  
some of which are a fair rate of wages, assurance of competent ap-  
provision, election of officers and members in accordance with the  
constitution and by-laws of the union, the exclusion of non-members  
from the union, hence benefits of \$2,000, with benefits of \$200 a  
week if unemployed, etc. The bill further alleged that there  
were 400 members of the local union, that 300 persons were working  
in the moving steamboathouse who were not members of the union  
but who were known as "Rabbit Men", having wrongfully been given  
permits by officers of the union without any examination of the  
applicant; that constitutionally since 1921, non-members employed  
with other known persons to violate the constitution and by-laws  
of the local union for the purpose of obtaining and maintaining  
control of the union for the benefit of the defendants, and per-  
mitting them fraudulently to exercise the union and to convert its  
assets to their own use; that in December of 1921, 1922, 1923 and 1924  
the defendants in 1922, 1923 and 1924 conducted unfair elections so  
that they could continue in control of the union for their own  
benefit; that to accomplish this result they employed gunmen who  
intimidated the members of the union by threats so that there was  
not a free or fair election of officers by the members; that they,  
by intimidation and threats, persecuted themselves in office and  
control of the union, employing gunmen for this purpose and  
threatening anyone who dared to seek any office without their  
favor; that defendants, in furtherance of the conspiracy, issued  
illegitimate notices to certain other persons to convert their business  
who were wholly unqualified; that they also issued "Rabbit" per-  
mitting others to do the work of union men for their own benefit;  
that in 1921, defendants received \$100,000 to conduct a lock-out  
by the Allied Maritime Council Association but refused to accept  
for this money; that defendants also refused to accept the other



moneys they had received in other official capacities, which belonged to the union; that in 1931 the grand jury of Cook county took cognizance of the defendants' wrongdoing and indicted some of them; that through the wrongful acts of the defendants a number of theaters which employed union men were wrongfully closed, and in making this wrongful contest against the theater owners defendants spent approximately \$200,000 of the union's money; that defendants had falsely charged complainants and other members of the union with violating certain sections of the constitution and by-laws, and there was a purported hearing without notice to the accused; that the charges made were baseless; that at the hearing certain members of the union were denied proper representation; denied the use of a court reporter; and denied the right to cross examine the witnesses testifying against them; that after such hearings defendants purported to enter judgment against members of the union, imposing a fine of \$5,000 against many of them, and the loss of voice and vote for a period of two years; that such members were denied the right to appeal; - all contrary to the provisions of the constitution and the by-laws of the unions; that defendants have threatened complainants and intimidated them because they are demanding their rights under the constitution and the by-laws, and that defendants, unless restrained by an order of court, will assign or dispose of the assets of the local union; that defendants have extravagantly run the affairs of the union, having an overhead of over \$75,000, while the income was only about \$44,000; that defendants voted themselves large salaries; that defendant business manager was in 1928 paid \$225 a week, which was later increased to \$300 a week and still later to \$500 a week. Many other charges are made, but we do not refer to them here. The prayer of the bill was that certain of the pretended elections of the officers be declared null and void, and that positions be filled at an

money they had received in other official capacities, which be-  
longed to the union; that in 1931 the grand jury of such county  
took cognizance of the defendants' wrongdoing and indicted some of  
them; that through the wrongful acts of the defendants a number of  
persons which employed union men were financially injured, and in  
violation of the defendants' contract with the union men the defendants  
spent approximately \$200,000 of the union's money; that defendants  
had falsely charged complainants and other members of the union  
with violating certain sections of the constitution and by-laws,  
and there was a purported hearing without notice to the accused;  
that the charges made were baseless; that at the hearing certain  
members of the union were denied every representation; that the  
use of a court reporter; and denied the right to cross examine the  
witness testifying against them; that after such hearings defend-  
ants purported to enter judgment against members of the union, im-  
posing a fine of \$5,000 against many of them, and the loss of  
voice and vote for a period of two years; that such members were  
denied the right to appeal; - all contrary to the provisions of  
the constitution and the by-laws of the union; that defendants  
have threatened complainants and intimidated them because they  
are exercising their rights under the constitution and the by-laws,  
and that defendants, unless restrained by an order of court, will  
continue to dispose of the assets of the local union; that defendants  
have extravagantly run the affairs of the union, having an overhead  
of over \$75,000, while the income was only about \$45,000; that de-  
fendants used to receive large salaries; that defendant business  
manager was in 1934 paid \$250 a week, while the latter increased to  
\$300 a week and still later to \$350 a week. Many other charges  
are made, but we do not repeat them here. The prayer of the  
bill was that certain of the proposed allegations of the plaintiffs  
be declared null and void, and that judgment be entered in

election properly held; that the pretended judgment and fines issued against the complainants and other members of the union be vacated and held for naught, that complainants be restored to full membership in the unions, and that an accounting be had.

Defendants contend that the decree should be affirmed because there is no allegation that complainants had been expelled from membership in the local union, and that there is no allegation that complainants were put on trial for any offenses resulting in their expulsion, but that the theory of complainants, and their counsel's argument, is that complainants have been expelled from the local union and that the primary object of the bill is to restore them to membership. A further contention of the defendants is that a court of equity is without jurisdiction to restore a person to a membership in a local union.

Whether allegations of the bill are sufficient to show that complainants and other members were wrongfully expelled from the union, they are, we think, sufficient to show that complainants and other members were excluded from the benefits of the union. They were unable to obtain employment because of the acts of the officers of the union; many illegal permits, it is charged, were issued so that there were not places enough to go around; charges are made of acts of defendants in intimidating complainants and other members so that fair elections could not be held, and further, that the moneys belonging to the union were wrongfully expended.

We think these allegations are sufficient to warrant the interposition of a court of equity. But counsel for defendants say that there is no allegation that complainants have exhausted their remedy within the local or international union, and that it is elementary one cannot go into equity until he has exhausted his rights within the union. We think it sufficiently appears from the allegations that an appeal would have been futile. It is



election properly held; that the presented judgment and those  
issued against the complainants and other members of the union be  
vacated and held for nullity. That complainants be restored to full  
membership in the union, and that an accounting be had.  
Reliefs sought that the decree should be affirmed be-  
cause there is no allegation that complainants had been expelled  
from membership in the local union, and that there is no allegation  
that complainants were put on trial for any offense resulting in  
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that complainants and other members were wrongfully expelled from  
the union, they are, we think, sufficient to show that complainants  
and other members were excluded from the benefits of the union.  
They were unable to obtain employment because of the acts of the  
officers of the union; many illegal permits, it is charged, were  
issued to men who were not licensed workers in the industry; others  
were made of acts of defendants in intimidating complainants and  
other members so that fair elections could not be held, and further,  
that the money belonging to the union was wrongfully expended.  
We think these allegations are sufficient to warrant the  
interposition of a court of equity. But counsel for defendants say  
that there is no allegation that complainants have exhausted their  
remedy within the local or international union, and that it is  
elementary one cannot go into equity until he has exhausted his  
rights within the union. We think it sufficiently appears from  
the allegations that an appeal would have been timely. It is

alleged that defendants were denied the right of appealing, and while the allegations are not specific, we think they are sufficient to warrant a court of equity in inquiring into the merits of the matter. From the allegations of the bill we think any attempt to appeal would have been unavailing. We therefore hold that the second amended bill of complaint stated a cause for equitable relief, and the decree of the Superior court of Cook county is reversed and the cause remanded for trial.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

alleged that defendants were denied the right of appealing, and while the allegations are not specific, we think they are sufficient to warrant a court of equity in inquiring into the merits of the matter. From the statement of the bill we think any attempt to appeal would have been unavailing. The court held that the second amended bill of complaint stated a cause for equitable relief, and the decree of the Superior Court of Cook County is reversed and the cause remanded for trial.

REVEREND AND HONORABLE

ROBERT H. HARRIS, J., Clerk.



37139

CHICAGO MORTGAGE CORPORATION,  
a Corporation,

Appellee,

vs.

GARABED T. PUSHPAN,

Appellant.

APPEAL FROM MUNICIPAL COURT  
OF COOK COUNTY.

274 I.A. 663<sup>5</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, as owner of certain notes secured by a trust deed on property in Cook county, Illinois, brought suit against the defendant who had purchased the encumbered property subject to the mortgage, which encumbrance the defendant assumed and agreed to pay, plaintiff claiming there was a balance due of \$4500, with certain interest. The defendant denied liability and there was a trial without a jury and a finding and judgment in plaintiff's favor for \$2487.78, being the amount remaining unpaid at the time of the trial, and the defendant appeals.

The record discloses that on August 16, 1929, Louis Kerno and wife, and Josephine Rosenstein and wife, executed a junior mortgage on real estate in Cook county to Charles S. Brill, trustee, securing an indebtedness of \$10,000, and to evidence the indebtedness the Kernos and Rosensteins executed their twenty-four principal promissory notes due on specific dates mentioned. The last note for \$5400 was due and payable on August 15, 1931. It is to recover the balance due on this note that the instant suit was brought.

July 1, 1931, the defendant, Pushman, entered into a written contract with Louis Kerno, one of the makers of the notes and trust deed, who owned the real estate covered by the mortgage, to exchange certain properties owned by Pushman and located in DuPage county, Illinois. The property in question was to be conveyed subject to the junior mortgage above mentioned and on which there was then a

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1964-65 season as the subject to come on, 1964-65

There are several reasons why the results of this study may not be generalizable to other populations. First, the study was conducted in a single, urban, tertiary care hospital. Second, the study was limited to patients who were able to provide informed consent. Third, the study was limited to patients who were able to understand and follow the study protocol. Fourth, the study was limited to patients who were able to complete the study protocol. Fifth, the study was limited to patients who were able to complete the study protocol.

and as before, the same conditions are assumed.

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Information may be obtained about the person and the person's

prominent roles in the development of the country.

THE UNIVERSITY OF CHICAGO PRESS

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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Figure 1. The effect of the concentration of the polymer solution on the apparent viscosity of the polymer solution.

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balance due of \$5800 which the defendant, Fushman, expressly assumed and agreed to pay. July 18, 1931, Karno and his wife by warranty deed conveyed the property in question to defendant, Fushman, pursuant to the terms of the written contract. The deed recited that the conveyance was made subject to the trust deed of August 15, 1929, and that Fushman assumed and agreed to pay the balance of the indebtedness secured by that trust deed. July 22, 1931, defendant Fushman and wife conveyed the property to Selma Stein by warranty deed, subject to the balance of the indebtedness secured by the trust deed, which the grantee assumed and agreed to pay. This deed was recorded August 10, 1931.

August \_\_\_\_\_ 1931, defendant, Fushman, wrote a letter addressed to Louis Karno, stating that the balance of the debt secured by the mortgage would fall due August 15, 1931, and requesting Karno to assist defendant in obtaining an extension of the time of payment of the indebtedness. The letter mentions the mortgage of August 15, 1929, and the indebtedness which Fushman says, "I assumed and agreed to pay at the time I acquired the property from you;" that there was a balance then due of \$5400, and requested Karno to "do whatever you possibly can to assist me in obtaining an extension of the time within which to pay the same;" that he would indemnify Karno against any and all claims that might be asserted against him for non-payment of the indebtedness; that Fushman would pay a commission of \$270 for the extension and that in the event Fushman paid the entire indebtedness, "I shall be subrogated to such rights, if any, that you may have in and to the said mortgage."

The evidence further tends to show that the letter just referred to was delivered by counsel for defendant to Joseph Rosenstein, above mentioned, who was an attorney at law and one of the makers of the note and trust deed in question, requesting him



Believe me, I think with the highest regard, yours truly,

He also did not work, 1931, 32 years ago at home, his home

...and the ... of ... ..

[illegible]

Realized that the employees were made subject to the threat of loss of

and Yang of Beijing have been the principal authors of this book, 1991, 51 pages.

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Journal of Applied Gerontology 33(4):403-416, 1998

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22. The first of these is the fact that the

• 天津 • 北京 • 上海 • 香港 • 廣州 • 汕頭 • 廈門 • 福州 • 寧波 • 溫州 • 杭州 • 紹興 • 嘉興 • 湖州 • 蘇州 • 無錫 • 常州 • 鎮江 • 揚州 • 南通 • 蕪湖 • 安慶 • 九江 • 南昌 • 長沙 • 衡陽 • 桂林 • 柳州 • 貴陽 • 昆明 • 重慶 • 成都 • 西安 • 蘭州 • 西寧 • 拉薩 • 台北 • 高雄 • 基隆 • 台中 • 台南 • 新竹 • 嘉義 • 屏東 • 花蓮 • 台東 • 澎湖 • 金門 • 馬祖 • 香港 • 澳門 • 台北 • 高雄 • 基隆 • 台中 • 台南 • 新竹 • 嘉義 • 屏東 • 花蓮 • 台東 • 澎湖 • 金門 • 馬祖

He killed a sixty-pound, fourteen-year-old boy.

Approved by Louis Lamm, dated 10/10/1961

Approved for Release 2001/08/23 : CIA-RDP80-01060A000100010001-6

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to the same extent as the other members of the family.

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[illegible]

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At the same time, the two men were dressed in white shirts and in

[illegible]

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... ..

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\* *Journal of Management Education* 30(10):1139-1150, 2006.

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to endeavor to have the time extended for the payment of the balance due under the mortgage. The evidence further shows that in July, 1931, when the defendant, Pashman, was negotiating for the purchase of the property from Karno he had a prospective purchaser, Selma Stein, and that about August 1st, 1931, when he wrote the letter addressed to Karno above mentioned, he was not certain whether the proposed sale by him of the property in question to Stein would be consummated, and he thereupon wrote the letter requesting that the time of payment of the balance due be extended. While the deed from Pashman to Stein is dated July 22, 1931, it was not recorded until August 10, 1931, and there is evidence to the effect that it was not delivered until the last mentioned date. There is other evidence to the effect that after the property was conveyed to Selma Stein she secured an agreement from plaintiff, the owner of the note, and from Karno, one of the makers of the note, whereby the time of payment was extended six months. There was no written agreement prepared but it is assumed by everyone, and the testimony shows, that the time of payment was so extended.

The defendant contends that the loan, when it was made in 1929, the time of the execution of the notes and trust deed, was tainted with usury because the evidence shows plaintiff was paid 16 per cent commission, and defendant says that the loan was ultra vires plaintiff corporation. There is no merit in these contentions because the evidence shows that after the execution of the note and trust deed the property was conveyed subject to the mortgage which the grantee assumed and agreed to pay. In these circumstances the question of usury is out of the case, and the question of ultra vires was not in the case because such a question was not interposed as a defense, and the denial of defendant's request, made near the close of the case, for leave to plead such defense, was properly denied. It is certain that we would not be warranted in

to endeavor to have the line extended for the payment of the balance due under the mortgage. The witness further stated that in July, 1931, when the defendant, Thomas, was negotiating for the purchase of the property from James he had a prospective purchaser, John Stein, and that about August 1st, 1931, when he wrote the letter mentioned in being above mentioned, he was not certain whether the proposed sale of the property in question to Stein would be consummated, but he mentioned to the latter for purposes that the date of payment of the balance due be extended. While the term James is stated to have died July 22, 1931, it was not recorded until August 12, 1931, and there is evidence to the effect that it was not delivered until the last mentioned date. There is other evidence to the effect that after the property was conveyed to John Stein who assumed an agreement from plaintiff, the owner of the note, and two parties, who at the date of the note, whereby the time of payment was extended six months. There was no written agreement prepared but it is assumed by everyone, and the testimony shows, that the time of payment was so extended. The defendant contends that the loan, when it was made in 1928, the time of the execution of the note and first deed, was related with money because the witness stated that the loan was given to get over a commission, and he almost says that the loan was given to get over a commission. There is no more in these matters. Since because the witness stated that after the execution of the note and first deed the property was mortgaged to the wife, and after the property was mortgaged and agreed to pay. In fact almost the question of money is out of the case, and the question of the time was not in the case because such a question was not introduced as a defense, and the denial of defendant's request, made near the time of the case, for leave to place such defense, was accordingly denied. It is certain that we would not be warranted in



holding that the court abused his discretion in refusing leave to make such a defense at that time. Valentine v. Fish, 45 Ill. 462; Crawford v. Simmons, 180 Ill. 143; Wilson v. Reed, 263 Ill. App. 230; Greengard v. Katz, 270 Ill. App. 227.

In the Greengard case we discussed the above authorities on this question and held that where property is sold subject to an incumbrance which the grantee assumes and agrees to pay as part of the purchase price, the question of usury is out of the case. And on page 232 we quote the rule as announced in the Valentine case (45 Ill. 462), which is as follows: "The doctrine is well established, that the owner of land who has given a usurious mortgage upon it, may sell or mortgage the land to another, generally, and give to such purchaser or mortgagee, by express agreement, the same right to contest the validity of the first mortgage as he had himself. But he may affirm the validity of the usurious mortgage by selling only the equity of redemption in the mortgaged premises, or by selling or mortgaging the land, subject in express terms to the previous mortgage; in which case the purchaser or subsequent mortgagee will be entitled to the equity of redemption solely, and cannot question the validity of the prior mortgage."

The only question in the case for decision is whether the time of payment of the balance due on the note in question was extended at defendant's request or with his knowledge and consent. The evidence on this question was not fully brought out and there is some conflict. Whether the trial Judge had this point specifically in mind when he decided the case is not clear. When the question was first brought into the case during the hearing by counsel for defendant - evidence which tended to show that the time of payment had been extended without defendant's knowledge or request - counsel for plaintiff objected that such evidence was not relevant, and the court seems to have been of the same view, but ruled that



he would let defendant go into that question, and it was accordingly done. We must assume, however, that on this question the court found that the time of payment had been extended at defendant's request. Otherwise he would not have entered judgment for plaintiff.

Upon a careful consideration of all the evidence in the record on this question, we are of opinion that the finding of the trial Judge is against the manifest weight of the evidence. We think the evidence shows that the time of payment was extended at Stein's request and not at the request of the defendant. Selma Stein, who purchased the property from defendant, was represented by her husband, Joseph Stein, a lawyer. He testified that he negotiated for the extension through John J. Mack, who was in the real estate financing business, and that when the agreement was made to extend the time of payment Stein paid Charles Brill, president of plaintiff company, \$270 as commission for the extension of the loan, and his cancelled check is in evidence. All the subsequent payments were of course made by Stein, the new owner.

Mack testified that he represented Stein and a Mr. Wallach in negotiations with Brill for the extension of the loan. Just what connection Wallach had does not appear. Mack testified that he talked to Brill over the telephone, that he asked Brill to have the time of payment extended and Brill told him to take the matter up with Karne and Rosenstein, makers of the trust deed and notes; that accordingly he took the matter up with Rosenstein, who is also a lawyer, and told him that Brill had referred him to Karne and himself, and thereupon Rosenstein said he would take the matter up with Karne and Brill; that he later saw Rosenstein, who told him the loan would be extended for six months provided there was a commission of \$270 paid Brill; that afterward Stein agreed to do this, the commission was paid by Stein, and the loan extended.

Brill testified that he never heard of Mack; that he re-



he would let Williams go into that position, and it was accordingly done. He made no money, however, from this position the next year. The fact that the fact of payment had been extended at Williams's request, Williams would not have asked Williams for anything. Then a certain number of all the evidence in the case on this question, we are of opinion that the finding of the trial judge is against the majority of the evidence. We think the evidence was a fact and some of payment was made at Williams's request and not at the request of the defendant. Williams, the defendant, was present from the beginning, and Williams was not present, because Williams, a lawyer, he testified that he was not present for the extension through John L. Williams, who was in the room at the time Williams, and that when the extension was made to extend the time of payment again Williams testified that he was present, and his connection with it is in evidence. All the subsequent payments of money were by Williams, the law firm, and Williams testified that he was present when a Mr. Williams was negotiating with Williams for the extension of the loan. That was a concession which had been not agreed, and Williams testified that he talked to Williams over the telephone, that he asked Williams to have the time of payment extended and Williams said to him the money up with him and Rosenbaum, owners of the first bank and notes; that afterwards he took the money up with Rosenbaum, who is also a lawyer, and said that Williams had returned to him and Williams, and that Williams had said he would take the money up with him and Williams; that he later saw Rosenbaum, who said him the loan would be extended for the money provided there was a commission of \$1000 paid Williams; that afterwards Williams asked to be paid, the commission was paid by Williams, and the loan extended. Williams testified that he never heard of Williams, that he was

ceived the Stein check for \$270 for commission for extending the loan and he thought the check was brought in by Karno. He further testified that he had a conversation with Davidson, counsel for defendant, who asked for an extension of the time of payment, "but I would not agree to it;" that he never spoke to Pushman about the extension of time of payment of the loan.

Davidson testified that he represented the defendant; that he prepared the letter above referred to, which is signed by defendant and addressed to Karno, requesting that the time of payment be extended because he was not sure whether the sale from Pushman to Stein would be consummated; that he delivered the letter to Joseph Rosenstein and asked him to make arrangements for the extension of the loan with Brill and Karno for Pushman; that Rosenstein later told him he could not get Karno to make any definite arrangements with Brill on account of the fact that Brill wanted commissions and that at a later conversation the witness told Rosenstein that the latter did not get the mortgage extended for Pushman. The evidence further shows that after the instant suit was brought, June 4, 1932, Stein procured a purchaser for the property and at that time \$1500 was paid on account of the indebtedness and the trust deed released under the express agreement that it should not affect plaintiff's rights against the defendant in the instant case. Other payments were made so that at the time of the trial the indebtedness was reduced to the amount for which the judgment was entered.

Rosenstein testified that he was a partner of Karno and was interested in the property in question when the note and trust deed were executed; that he was asked by Davidson to get an extension of the loan for defendant, which he agreed to do if Pushman would pay commission for the extension, because Pushman had assumed and agreed to pay the balance of the indebtedness; that he would

"but I would not agree to it;" that he never spoke to Tolson about the extension of time of payment of the loan.

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That he executed the latter document in 1937, which is signed by  
Helen and addressed to him, representing that the time of pay-  
ment be extended because he was not able to make the same time  
arrangement to him as he would be compensated; that he delivered the latter  
to Joseph Rosenberg and asked him to make arrangements for the  
extension of the loan with Helen and Joseph Rosenberg; that Helen  
also later told him he would not get money to make any further  
arrangements with Helen on account of the fact that Helen wanted  
Helen to be a good businesswoman and Helen said Helen  
again that she later did not get the money she needed for Helen  
the money that she said she needed with her husband,  
June 4, 1937, Helen executed a document for the property and at  
that time Helen was with an account of the instrument and the  
fact that Helen was the owner of the property and that Helen was  
Helen's financial statement and the fact that Helen was  
Helen's financial statement and the fact that Helen was  
Helen's financial statement and the fact that Helen was

and agreed to pay the balance of the indebtedness; that he would



take the matter up with Karno and thereupon Davidson prepared the letter which was signed by Fushman and addressed to Karno and it was delivered to the witness. He further testified, "I got the extension for him," but what he did or when he saw does not appear in the record, except that he negotiated the matter through Mack.

It appears from the foregoing evidence that Stein testified he procured the extension for Mrs. Stein through Mack. Mack corroborates this and although Brill testifies he never heard of Mack, he further testified that he refused to grant Fushman an extension when called upon by Davidson to do so. The testimony of all the witnesses on this question, except Rosenstein, is that the time of payment was extended for Stein and that it was not extended for defendant, Fushman. Rosenstein testified that he got the extension for Fushman, but how he did this does not appear. Stein paid the commission of \$270. We are therefore of opinion that the overwhelming weight of the evidence is to the effect that the extension was procured for Stein without the knowledge or consent of Fushman. In these circumstances Fushman was released from his liability to pay the balance of the mortgage indebtedness which he assumed and agreed to pay it when he purchased the property. Albee v. Gross, 250 Ill. App. 93; Metz v. Dianne, 250 Ill. App. 369; Douglas v. Hilsenrath, 251 Ill. App., 145; Binga v. Hall, 259 Ill. App. 351; Parsons & Merchants Bank v. Harvid, 259 Ill. App. 354.

Holding as we do, that the finding is against the manifest weight of the evidence, and since there was no jury, the judgment of the Municipal court of Chicago is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

Matchett, P. J., and McGuire, J., concur.

(See next page.)

There is the record, except that he neglected the latter through  
extension for him," but what he did or when he was seen was  
was delivered to the witness. He further testified, "I did not  
lasted which was signed by someone and delivered to him and he  
told the writer up after having had numerous meetings with him and

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*(The following information was obtained from the above source.)*

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*[Faint, illegible text]*

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37243

MARGARET T. McGOVERN and JOSEPH V.  
McGOVERN, as Executrix and Executor  
of the Estate of Michael H. McGovern,  
Deceased,

Appellants,

vs.

Claim of DR. GEORGE W. MAX,  
Appellee.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

274 I.A. 664<sup>1</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Judgment for \$480 was entered on the verdict of a jury in favor of Dr. George W. Max, being the amount he claimed for dental services performed for A. E. Ford at the request of Michael H. McGovern, the deceased, and for which it is claimed Dr. McGovern agreed to pay.

The record discloses that Michael H. McGovern died testate October 30, 1930, and his estate was probated in the Probate court of Cook county; that April 8, 1931, claimant filed his itemized claim against the estate for \$480. It purports to be for dental work done for McGovern personally. The first charge is May 9th and the last October 25, 1929, and the number of hours 27. A photostatic copy of this claim is in the record. Both parties seem to agree that this is the first claim filed by claimant and that he afterward filed another claim in lieu of the first one for \$480 for dental work he claimed he had performed on Ford, who was McGovern's barber, at McGovern's special instance and request and for which McGovern agreed to pay; this second claim, which is itemized, shows the first item as of October 23, 1929, and the last August 22, 1930, and a total of 51½ hours. Neither this second claim nor any copy of it as filed in the Probate court is in the record, but the facts concerning it seem to have been agreed to on the trial. Counsel for the estate stated on a number of occasions during the trial that the second claim "was filed in the Probate court, came up for hearing on

MARGARET T. KEOGH and JOSEPH V. KEOGH, as Executors and Administrators of the Estate of Michael E. Keogh, deceased.

vs.

vs.

Claim of Mr. George W. Hax, deceased.

274 I.A. 664

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Judgment for \$400 was entered on the verdict at a jury in favor of Dr. George W. Hax, being the amount he claimed for dental services performed for A. E. Hax at the request of Michael E. Keogh, deceased, and for which it is claimed Mr. Keogh agreed to pay.

The record shows that Michael E. Keogh died testate October 20, 1930, and his estate was probated in the Probate Court of Cook County; that April 8, 1931, claimant filed his claim against the estate for \$400. It purports to be for dental work done for Keogh personally. The first charge is for \$20 and the last October 28, 1930, and the number of hours 27. A photostatic copy of this claim is in the record. Both parties seem to agree that this is the first claim filed by claimant and that he afterwards filed another claim in lieu of the first one for \$400 for dental work he claimed he had performed on Hax, who was Keogh's partner, at which Keogh's special insurance was required and for which Keogh agreed to pay; this second claim, which is filed, shows the first item as of October 25, 1930, and the last August 22, 1930, and a total of 217 hours. Neither this second claim nor any copy of it is filed in the Probate Court in the record, but the facts concerning it seem to have been stated in the trial. Counsel for the estate stated on a number of occasions during the trial that the same claim was filed in the Probate Court, and up to the hearing on



January 11, 1931, and was dismissed." Obviously this date is erroneous because the first claim was not filed until April 8, 1931. But the discrepancy is not important and we base our opinion on the facts as they seem to have been agreed on by counsel, and that they are that the first claim was for \$480 based upon dental work done for McGovern personally, the items of which are entirely different from the items mentioned in the second claim, which is for \$480 for work claimed to have been done for Ford at McGovern's request.

On the hearing in the Circuit court when the estate was putting in its defense, it developed that the claim certified by the Probate court in the transcript in the record filed in the Circuit court was the first claim instead of the second. Counsel for claimant then, by leave of court and over objection of counsel for the estate, amended the claim to show that the work was done on Ford and that the items aggregated 51½ hours as itemized in the second claim.

It is contended by counsel for the estate that this amendment was erroneously allowed. We think this contention cannot be sustained. Counsel for the estate was not taken by surprise because this amended claim had been filed secondly in the Probate court. Both claims were for \$480 and the evidence tends to show that the first claim, which was for work claimed to have been done for Mr. McGovern, was prepared in the manner at the suggestion of Mr. McGovern's secretary so as to make it appear that the work was done for Mr. McGovern personally, and not for Mr. Ford. The claim in substance was not changed, the estate was in no way injured by the amendment and, under the law, the amendment was properly allowed. Blair v. Sannott, 134 Ill. 78; Est. of Johnson v. Kilpatrick, 250 Ill.App. 416.

Counsel for the estate further contends that the circumstances which surround the claim "cover it with grave suspicion" as to its merits; that the work claimed to have been done for E. A. Ford

January 11, 1931, and was dismissed." Obviously this date is erroneous because the first claim was not filed until April 8, 1931. But the discrepancy is not important and we have our opinion on the facts as they seem to have been agreed on by counsel, and that they are that the first claim was for \$400 based upon General work done for McGovern personally, the items of which are entirely different from the items mentioned in the second claim, which is for \$400 for work claimed to have been done for Ford at McGovern's request.

On the hearing in the Circuit court when the estate was meeting in its defense, it developed that the claim verified by the Probate court in the transcript in the record filed in the Circuit court was the first claim instead of the second. Counsel for estate, then, by leave of court and over objection of counsel for the estate, amended the claim to show that the work was done on Ford and that the items suggested in Ford's claim as itemized in the second claim.

It is contended by counsel for the estate that this amendment was erroneously allowed. We think this contention cannot be sustained. Counsel for the estate was not taken by surprise because this amended claim had been filed previously in the Probate court. Both claims were for \$400 and the evidence tends to show that the first claim, which was for work claimed to have been done for Mr. McGovern, was presented in the manner at the suggestion of Mr. McGovern's secretary as he to make it appear that the work was done for Mr. McGovern personally, and not for Mr. Ford. The claim in substance was not changed, the estate was in no way injured by the amendment and, under the law, the amendment was properly allowed. Claim No. 1.

Counsel for the estate further contends that the amendment which purports the claim "over it with grave suspicion" as to the matter; that the work claimed to have been done for E. A. Ford

covered a period of about a year from October 23, 1929, to August 22, 1930; that the claim should have been presented during Mr. McGovern's lifetime, and that "It does not seem reasonable that the decedent would let such a matter stand unpaid if he (McGovern) was the liberal character that would assume so large a debt in behalf of his barber;" that such bills are paid with great promptness. We think there is merit in this contention, but we would not be warranted in finding that the verdict and judgment are against the manifest weight of the evidence in view of the positive, uncontradicted evidence given by apparently disinterested witnesses that Mr. McGovern requested that the work be done and said he would pay for it. Moreover, the decedent's secretary, who might have been able to throw some light on the matter, was not called as a witness.

What we have said disposes of the contention that the court erred in refusing an instruction offered by the estate.

A further contention is made by the estate that the court erred in permitting Dr. Corsant, a dentist, to give expert testimony as to the value of the dental work done by plaintiff on the ground that the witness was not qualified. The witness testified that he was a licensed dentist in this State and had practiced his profession generally from 1902 to 1914, since which time he had specialized on investigations. He further testified that he was familiar with the usual, customary charge in Chicago for work of the kind performed by plaintiff; and further, that he had examined Ford's mouth and teeth before the work was done; that he saw plaintiff perform some of the work and had examined Ford's teeth after the work was completed. In these circumstances, we think the objection was properly overruled.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Hatchett, P. J., and McGuire, J., concur.





37312

PAUL LAZAR,  
Plaintiff in Error,

vs.

FIRST UNION TRUST AND SAVINGS  
BANK, a Corporation,  
Defendant in Error.

77  
H  
ERROR TO MUNICIPAL COURT  
OF CHICAGO.

274 I.A. 664<sup>1</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

April 19, 1933, plaintiff brought suit against the defendant to recover \$500 with interest at 3% per annum from December 5, 1930, to December 5, 1931, and 5% thereafter. There was a directed verdict in favor of the defendant, and plaintiff prosecutes this writ of error.

The substance of plaintiff's statement of claim is that on December 5, 1930, he deposited \$500 with the defendant and thereupon the defendant issued its certificate of deposit for \$500, payable to plaintiff's wife twelve months after date, with interest at 3% until maturity and 5% thereafter; that at the time it was agreed between plaintiff and defendant that defendant would pay the certificate of deposit to plaintiff's wife twelve months after date upon condition that plaintiff's wife continuously lived with him as husband and wife for a year; that if plaintiff and his wife did not continue to so live together, defendant would return the \$500 to plaintiff.

It is further alleged that at the time of the issuance of the certificate of deposit it was delivered to a third party in escrow, who was to keep it safely during the twelve months and thereafter deliver it to plaintiff's wife in case she lived continuously with plaintiff for a year; that February 1, 1931, plaintiff's wife left him without cause and refused to live with him thereafter; that defendant knew plaintiff's wife had left him and refused to live with him, and that December 5, 1931, plaintiff





demanding the return of the \$500, which demand was refused.

July 28, 1933, defendant filed its second amended affidavit of merits in which it denied that December 8, 1930, plaintiff deposited \$500 with it, as he alleged, but averred the fact to be that the \$500 was deposited with defendant by plaintiff's wife. It further denied that it entered into any agreement with plaintiff that it would pay him \$500 conditioned upon plaintiff's wife continuing to live with him for one year. It further set up that at the time the certificate was issued by defendant it was requested to place on its record the notation that the certificate was held by a third party; and that defendant was requested not to pay the certificate in case it was lost, without its presentation, all of which it alleged was in furtherance of some personal arrangement between plaintiff and his wife, the details of which were unknown to defendant.

The affidavit of merits further set up that February 6, 1931, plaintiff's wife, with the third party, presented the certificate of deposit which defendant paid to plaintiff's wife.

October 31, 1933, the case came on for trial before a Judge and a jury and at that time defendant was given leave to and it filed an additional affidavit of merits in which it was averred that August 24, 1931, a judgment was entered in favor of the defendant and against plaintiff, in which it was set up that in a suit brought by plaintiff against defendant, wherein plaintiff sought to recover the same \$500, plaintiff's statement of claim was stricken for insufficiency and judgment was entered in favor of the defendant for costs; that after the certificate of deposit for \$500 was issued, and before the year had expired, it was paid to plaintiff's wife at her request and the request of the third party who held it in escrow. The affidavit of merits further set up that the facts in plaintiff's statement of claim, "even if proven, disclose that the

...the return of the \$200, which demand was refused.  
July 25, 1931, defendant filed the second amended petition  
at which time it was denied that December 2, 1930, plaintiff de-  
manded \$200 with it, as he alleged, but averred the fact to be  
that the \$200 was deposited with defendant by plaintiff's wife. It  
further alleged that it entered into no agreement with plaintiff  
that it would pay him \$200 conditioned upon plaintiff's wife con-  
tinuing to live with him for one year. It further set up that at  
the time the certificate was issued by defendant it was requested to  
issue on the ground the certificate was held by a  
third party; and that defendant was requested not to pay the cer-  
tificate in case it was lost, without its presentation, all of  
which it alleged was in violation of some contract between  
defendant, plaintiff and his wife, the details of which were unknown to  
defendant.  
The affidavit of Maria Tardieu set up that January 6,  
1931, plaintiff's wife, with the third party, presented the certifi-  
cate to Tardieu which defendant said is plaintiff's wife.  
October 21, 1931, the same came on for trial before a Judge  
and a jury and at that time defendant was given leave to and it  
filed an additional affidavit of Maria in which it was averred that  
August 24, 1931, a judgment was entered in favor of the defendant  
and against plaintiff, in which it was set up that in a suit brought  
by plaintiff against defendant, wherein plaintiff sought to recover  
the same \$200, plaintiff's statement of claim was withdrawn for in-  
sufficiency and judgment was entered in favor of the defendant for  
costs; that after the certificate of deposit for \$200 was issued,  
and before the year had expired, it was said to plaintiff's wife as  
not request and the request of the third party who held it in an-  
other. One affidavit of Maria Tardieu set up that for some time  
plaintiff's statement of claim, "even if proven, discloses that the

plaintiff's claim is one in the nature of a parol trust in personal property, and the Municipal court of Chicago does not have jurisdiction to enforce a parol trust in personal property, and a court of chancery would be the only court so having jurisdiction."

The defence set up was that the judgment entered in the first suit was res adjudicata. In support of this defendant introduced in evidence plaintiff's third amended statement of claim filed in the first suit, and the judgment of the court sustaining defendant's motion to strike such statement of claim, and the judgment entered in favor of the defendant for costs. In the third amended statement of claim plaintiff alleged that on December 6, 1930, he deposited \$800 with the defendant; that it issued its certificate of deposit for that sum, payable to plaintiff's wife within one year upon condition that she lived continuously with him during the year; that she left him December 10, 1930, without fault on his part, and that February 5, 1931, he demanded the \$500 from the bank.

On the trial plaintiff contended that plaintiff's third amended statement of claim was stricken on the ground that the suit was prematurely brought because it was brought and determined within a year after the issuance of the certificate of deposit. On the other hand, defendant contended that plaintiff's third amended statement of claim and judgment entered in its favor was on the ground that plaintiff's claim involved was a "trust claim" of which the Municipal court had no jurisdiction, and a witness testified for plaintiff and another witness for defendant, tending to support their respective contentions.

The trial Judge stated that in the first suit he had stricken plaintiff's first and second amended statements of claim, "and I would not have given the plaintiff leave to amend his Statement of Claim if I decided the suit was premature," and thereupon he directed the verdict for defendant, judgment was rendered on the verdict, and





plaintiff prosecutes this writ of error.

Plaintiff's third amended statement of claim in the first suit was stricken by another Judge of the Municipal court. The trial Judge in the instant case struck the first and second statements of claim filed by the plaintiff in the first suit. The reason for striking plaintiff's third amended statement of claim does not appear.

Upon what theory plaintiff's claim was contended to be a "trust claim" we are unable to comprehend. It was a plain, ordinary suit for the return of \$500 in accordance with the terms of an express agreement and obviously the Municipal court had jurisdiction of the first case. We also think it obvious that plaintiff's first suit was not prematurely brought because under plaintiff's theory as shown by his statements of claim he was entitled to the return of the \$500 from the defendant bank if and when his wife did not continue to live with him for a year after December 5, 1930, when the certificate of deposit was issued. And plaintiff alleged that she left him without cause December 10, 1930, and that he demanded the money from the bank February 5, 1931. If his theory of the case was right, he was then entitled to his money and, as stated, his first suit was not prematurely brought. Unless the first suit was prematurely brought, the judgment rendered in that case would be res adjudicata in the instant case even if that judgment was erroneous, - the judgment being still in force and effect.

In these circumstances the directed verdict was warranted, and the judgment of the Municipal court of Chicago must be affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

plaintiff presented this writ of error.

Plaintiff's third amended statement of claim in the first

case was stricken by another judge of the Municipal court. The

trial judge in the instant case struck the first and second amended

statements of claim filed by the plaintiff in the first case. The

reason for striking plaintiff's third amended statement of claim

does not appear.

Upon what theory plaintiff's claim was concluded to be a

"first claim" as was stated in the judgment. It was a claim, contrary

to the terms of the judgment in accordance with the terms of an ex-

press agreement and obviously the Municipal court had jurisdiction

of the first case. He also said it is obvious that plaintiff's third

case was not previously brought because under plaintiff's theory

as shown by his statement of claim he was entitled to the return

of the \$200 from the defendant bank it and when his wife did not con-

come to live with him for a year after December 8, 1930, when the

certificates of deposit were issued. And plaintiff alleged that the

bank had wrongfully come December 10, 1930, and that he demanded the

money from the bank February 8, 1931. It is theory of the case

was right, he was then entitled to his money and, as stated, his

first case was not previously brought. Unless the first case was

previously brought, the judgment rendered in that case would be

the plaintiff in the instant case was in that judgment was wrong-

out - the judgment being still in force and effect.

In these circumstances the district court was warranted,

and the judgment of the Municipal court of Chicago must be affirmed.

Respectfully submitted,

Respectfully, J. J. Connel.



37400

A. A. ROYMAN,  
Appellee,

vs.

TOWER GARAGE COMPANY,  
a Corporation,  
Appellant.

OFFICIAL RECORD MUNICIPAL COURT  
OF CHICAGO.

274 I.A. 664<sup>3</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover the value of an automobile robe which he claimed was in his automobile when it was put in defendant garage and that when he got the car the next day the robe was missing. He claimed \$110. The defendant denied liability and filed a set-off, alleging that after plaintiff claimed to have lost the robe defendant loaned him two other robes of the value of \$40. Afterward, on motion of plaintiff, the set-off was stricken and no complaint is made in this respect. The case was tried before the court without a jury and there was a finding and judgment in plaintiff's favor for \$110 and the defendant appeals.

The record discloses that on February 4, 1933, plaintiff, who lived in Kansas City, and who was stopping at the Lake Shore Athletic Club, delivered his Cadillac automobile to the doorman of the club, who called up the defendant garage and one of its employees came to the club and drove plaintiff's automobile to the garage where it was kept during the night. On the next day the automobile was returned to the club and shortly thereafter plaintiff discovered that the robe was gone and notified the garage of this fact. Search was made for the robe, but it was not found.

The evidence further shows that plaintiff's mother bought the robe from Mandel Bros. for \$102, and gave it to her son for a Christmas present in 1932. There is no dispute as to the foregoing facts.

*[Faint, illegible markings]*

ST. ALBANS

"I have been thinking about you very much since we parted," she said.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a legitimate organization or a subversive one.

[illegible]

Christian returned in 1911. There he was elected as the first  
and first vice president. The 1911-12 year was the 1st  
the religious leaders had elected a woman leader.

A witness for defendant testified that he was night manager of defendant garage and February 4th, when plaintiff's car was brought into the garage he examined it and there was no robe in the car at that time; that "I examined all the automobiles that are delivered at the garage; that is my duty. I examined both the inside and outside of all cars delivered to the garage;" that he examined about 60 or 70 cars each night; that he remembered the particular car because it was a good Cadillac car.

Plaintiff and his mother testified that shortly after the robe was lost they called at the garage and talked with Mr. Barnard, the general manager of the garage; that he told them that the garage was responsible; that it was defendant's fault <sup>and</sup> that they would make good the loss; that he was satisfied the loss occurred in the garage.

Barnard denied that he had made such statements and denied he had admitted any liability on the part of defendant, but stated he told plaintiff and his mother that he would try to locate the robe and gave instructions to defendant's employees to see if it could be found.

The court, in deciding the case, expressly found that the robe was lost in the garage. While plaintiff testified by deposition, his mother testified in open court. In these circumstances we find the contention of defendant that the finding and judgment are against the manifest weight of the evidence, cannot be sustained and therefore, under the law, we are not warranted in disturbing the finding and judgment in plaintiff's favor.

The defendant further contends that the court should have found for the defendant as a matter of law, because "There is no evidence of acceptance by the defendant of the automobile robe in question, and the duties and responsibilities of a bailee cannot be thrust upon the defendant without its knowledge or consent;" that there is no evidence defendant had notice that the robe was in the





automobile and that in the absence of such notice, the defendant cannot be charged as bailee. In support of these contentions the defendant cites Michigan Central R. R. Co. v. Carrow, 73 Ill. 348, and other cases. In the Michigan Central R. R. case, a passenger on a railroad, took his trunk, which contained jewelry of the value of \$30,000, to the station. He gave the railroad no notice of the contents but checked the trunk as baggage. The trunk and its contents were destroyed by fire while being transported and it was held that the railroad company was not liable, it not having been shown that it was guilty of gross negligence in respect to the origin of the fire. Obviously that case is not in point. There was nothing to indicate that there was jewelry valued at \$30,000 or at any other sum in the trunk, while in the instant case it is common practice for robes to be in automobiles. This is shown by the fact that defendant's night manager testified, as above quoted, that it was his duty to examine both the inside and outside of all cars delivered to the garage and that he did so in the instant case. The other cases cited by the defendant are to the same effect and obviously are not in point.

Defendant also contends that the damages "are grossly excessive;" that there is not a scintilla of evidence in the record as to the value of the robe; that plaintiff's mother, on being asked as to the value of the robe, was not permitted to answer, on defendant's objection.

The court did erroneously sustain objections to questions put to plaintiff's mother as to the value of the robe, but she did testify, without objection, and properly so, that she paid \$102 for it a little more than a month before the robe was lost. We have a number of times held that in ordinary business transactions the price paid for an article is evidence of its value, there being no evidence which casts suspicion on the transaction. Cloyes vs.

antecedent and that in the absence of such notice, the defendant cannot be charged as before. In support of these contentions the defendant cites Highland Central R. Co. v. Garvey, 73 Ill. 233, and other cases. In the Highland Central R. Co. case, a passenger on a railroad took his trunk, which contained jewelry of the value of \$30,000, to the station. He gave the railroad no notice of the contents but checked the trunk as baggage. The trunk and its contents were destroyed by fire while being transported and it was held that the railroad company was not liable, it not having been shown that it was guilty of gross negligence in respect to the safety of the fire. Obviously that case is not in point. There was nothing to indicate that there was jewelry valued at \$30,000 or as any other sum in the trunk, while in the instant case it is common practice for ropes to be in automobiles. This is shown by the fact that defendant's night manager testified, as above quoted, that it was his duty to examine both the inside and outside of all cars delivered to the garage and that he did so in the instant case. The other cases cited by the defendant are to the same effect and obviously are not in point.

Defendant also contends that the damages "are grossly excessive"; that there is not a scintilla of evidence in the record as to the value of the rope; that plaintiff's mother, on being asked as to the value of the rope, was not permitted to answer, on defendant's objection.

The court did erroneously sustain objections to questions put to plaintiff's mother as to the value of the rope, but she did testify, without objection, and properly so, that she paid \$100 for it a little more than a month before the rope was lost. We have a number of cases which hold that in similar business transactions the price paid for an article is evidence of its value, there being no evidence which casts suspicion on the transaction. Clyde v.



Plattie, 231 Ill. App. 183.

While the point is not made, we are unable to understand how the court found and entered judgment in plaintiff's favor for \$110 when the only evidence in the record of the value of the robe was that it cost \$102. The judgment obviously is for too much.

The judgment will therefore be reversed and judgment entered in this court in plaintiff's favor against the defendant for \$102; all costs are to be paid by the defendant.

JUDGMENT REVERSED AND JUDGMENT HERE.

Matchett, F. J., and McGuire, J., concur.



37085

HANS E. LEHMAN,  
Appellee,

vs.

GRACE HELEN LEHMAN,  
Appellant.

APPEAL FROM SUPREME COURT  
OF COOK COUNTY.

274 I.A. 664<sup>4</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant and cross complainant, Grace Helen Lehman, from an order entered May 3, 1933, denying her motion that a decree entered at a former term of the court should be vacated and set aside and denying the prayer of her verified petition for leave to file a bill of review.

The cause is not a stranger to this court. Lehman v. Lehman, 258 Ill. App. 608. The cause was taken here upon a writ of error sued out by complainant, Hans Lehman, to review a decree which dismissed his bill and granted Mrs. Lehman a divorce on her cross-bill, as well as the custody of their three children - two daughters, one thirteen years of age, the other six, and a son ten years of age. This court affirmed that decree. The case went to the Supreme Court. Lehman vs. Lehman, 345 Ill. 539. That court reversed the decree and remanded the cause for further proceedings in accordance with the views expressed in the opinion. The cause was reinstated in the trial court on December 18, 1931, and the certificate of evidence shows that the cause came on for hearing on February 7, 1933, before a judge other than the one who conducted the former trial. No one appeared for defendant. The court asked solicitor for complainant whether the case was going to be tried as a default, to which he replied, "Yes, your Honor, we were prepared for a contest, but we will submit such testimony as your Honor thinks sufficient to support this decree."

Complainant, his brother Alfred and a friend, Arthur Bies, testified, and at the conclusion of the evidence on that date, the court directed solicitor for complainant to write up the evidence.



10000

WILLIAM E. LAMAR, JR.  
Applicant

vs.

STATE OF ALABAMA  
Respondent

274 I.A. 664

MR. JUSTICE LAMAR  
DELIVERED THE OPINION OF THE COURT

This is an appeal by defendant and cross-complainant, State

of Alabama, from the order of the Court, dated the 14th day of

June, 1933, in which the Court, upon the motion of the

defendant, set aside and annulled the order of the Court, dated the 14th

day of June, 1933, in which the Court, upon the motion of the

defendant, set aside and annulled the order of the Court, dated the 14th

day of June, 1933, in which the Court, upon the motion of the

defendant, set aside and annulled the order of the Court, dated the 14th

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day of June, 1933, in which the Court, upon the motion of the

defendant, set aside and annulled the order of the Court, dated the 14th

day of June, 1933, in which the Court, upon the motion of the

The following proceedings then took place:

"Mr. Juren (solicitor for complainant): If your Honor please, I am going to submit a decree here with reference to the adultery charge and ask that the custody of the two other children be awarded to him --

The Court: I am afraid you will have a lot of trouble.

Mr. Juren: This case has been in litigation for eight years and has been up to the highest court and back again, and I feel that from the evidence presented and the court's knowledge of the facts, that the court is warranted and justified in entering that order.

The Court: (Off the record.)

(Discussion off the record)

The Court: Write up the evidence."

February 24th thereafter the decree was entered finding the jurisdictional facts and finding that the defendant wife had committed adultery as charged in complainant's bill of complaint; that her cross bill was without equity and should be dismissed; that she was not a fit and proper person to have the care and custody of the minor children; further, that complainant had purchased real estate described; that he purchased it with his own funds, and that the title thereto was for convenience taken in his name and that of his wife; that she did not pay any part of the purchase price and is not, in fact, the owner of any part thereof. The decree dissolved the marriage, awarded the custody of the three children to complainant, ordered that the title to the premises should be confirmed in the name of complainant, directed defendant to convey the legal title of the premises to complainant forthwith; further found that defendant had refused to make the conveyance and ordered a master in chancery to make the conveyance for her and directed that upon her failure and refusal to surrender possession complainant should be let into possession and a writ of assistance be issued for that purpose. The hearing was held and finished in the February term. The decree was entered February 24th thereafter without notice and without submitting the decree to defendant's solicitors of record.

Rule 20 of the Superior court, of which this court will take judicial notice by reason of the statute, provided at that time the





"no motion will be heard or order made in any cause without notice to the opposite party, when an appearance of such party has been entered, except where a party is in default, as shown by an order of record or when a cause is reached on the call of the trial calendar." Rule 31 provides for the manner in which notice shall be served requiring it to be in writing and to be served upon the opposite party or his attorney or solicitor of record in the manner specified in the rule, with the further provision that where a party is in default for want of appearance, no notice shall be required except upon the order of the court.

The decree was apparently entered in this case upon the motion of solicitor for complainant, but no notice whatever was served either upon defendant or her solicitor. Having learned of the decree on March 20, 1933, solicitors for defendant gave notice that on the following day, at the opening of court, they would present the verified petition of defendant, supported by affidavits, and ask that an order be entered vacating or modifying the decree and would also ask that the custody of the children be given to their mother. On the same day an unsigned notice was filed, directed to defendant and William Eys that complainant would on March 21st ask for a writ of assistance to be issued to put complainant into possession of the premises. Defendant in support of her petition recited the history of the case, including the appeals to the Appellate and Supreme courts, and stated that she had prepared to defend the case when it should come up, and had had interviews with her solicitors relative to the evidence and witnesses. She stated that her husband paid \$20 a week alimony for the weeks ending February 11th, 18th, 25th and March 1st, which she believed was for the purpose of concealing from her that a hearing had been had without her knowledge on February 7th; that neither she nor her solicitors had any knowledge or information of the fact that the case was

"The motion will be heard or order made in any cause without notice to the opposite party, when an appearance of such party has been entered, except where a party is in default, as shown by an order of record or when a cause is removed on the call of the trial only under." Rule 21 provides for the manner in which notice shall be

served regarding it so he is willing and so be served upon the opposite party or his attorney or solicitor or record in the manner not specified in the rule, then the former provision shall have effect as in default for want of appearance, no notice shall be re-

quired except as hereinafter provided.

The docket was apparently entered in this case upon the motion of solicitor for respondent, but no notice whatever was served either upon respondent or her solicitor, having learned of

the docket as shown on file, solicitor for respondent gave notice

that on the following day, at the opening of court, they would pro-

ceed the varied position of defendant, supported by affidavits,

and ask that an order be entered vacating or nullifying the docket

and would also ask that the docket of the motion be given to

their motion. On the same day an undated notice was filed, directed

to defendant and William E. Jones complaining would on March 21st

ask for a writ of habeas corpus to be issued to put complainant into

possession of his premises. Defendant in support of her petition

submitted the affidavit of her agent, showing the receipt of the

affidavit and return of the writ, and stated that she had prepared to

obtain the same when it should come up, and had had interviews with

her solicitor relative to the evidence and witnesses. She stated

that her husband paid \$25 a week alimony for the years ending

February 21st, 1902, 1903 and March 1st, which was believed was the

the purpose of commencing from her time a hearing had been had with

out her knowledge on February 21st; that neither she nor her solicitor

had any knowledge or information of the fact that the case was

on trial on February 7th; that the statement that she or her solicitors had abandoned the case was false and made for the purpose of deceiving the court; that if the true facts had been called to the attention of the court it would not have proceeded to the trial of the cause; that the residence and home occupied by her and the children was purchased and paid for by their joint earnings and the title was held in joint tenancy; that the bill for divorce filed by complainant stated that the property was so held and prayed that the property owned in joint tenancy may be partitioned and sold, referring to the bill which was filed August 10, 1926; that the court erred in decreeing that complainant was the owner of the real estate; that there was no prayer for possession in his bill for divorce; that the court would not have found the ownership of the real estate and the use and occupation thereof to be in complainant, if the court had been advised of the true condition of the pleadings and the facts and represents that the court was without jurisdiction to so judge and decree. She further stated that she has a good and meritorious defense to the bill of complaint, and that she could establish her innocence of the charge of adultery and establish her rights in the real estate if given a hearing; that complainant's solicitor failed to keep his agreement and understanding with her solicitors; that the two youngest children are living with and being supported by her and have refused to live in the home of complainant; that on March 10, 1931, complainant came to her home intoxicated and drunk and threatened to take the children from her and she is prepared to prove all this on a hearing; that she has no money to pay moving expenses and rent if a writ of assistance is granted complainant; that she has not been served with any copy of the decree and that she appeals to the equitable jurisdiction and conscience of the court to assist her in her distress and misfortune.

Attached to this petition is the affidavit of one of de-



on trial on February 10th; that the statement that one or two calls-  
others had abandoned the case was false and made for the purpose  
of deceiving the court; that if the true facts had been stated to  
the attention of the court it would not have proceeded to the trial  
of the cause; that the residence and home occupied by her and the  
children was purchased and held for by their joint earnings and  
the wife was held in joint tenancy; that the bill for divorce  
filed by complainant stated that the property was as held and  
granted that the property owned in joint tenancy may be partitioned  
and sold, referred to the bill which was filed August 12, 1935;  
that the court acted in deciding that complainant was the owner of  
the real estate; that there was no prayer for possession in his  
bill for divorce; that the court would not have found the ownership  
of the real estate and the use and occupation thereof to be in com-  
plaint, if the court had been advised of the true condition of the  
pleading and the facts and represents that the court was without  
jurisdiction as no judge and answer. She further stated that she  
has a good and sufficient defense to the bill of complaint, and  
that she could establish her innocence of the charge of adultery  
and establish her right to the full return of her property;  
that complainant's solicitor failed to keep his agreement and  
interfering with her solicitor; that the two youngest children  
are living with her and being supported by her and have refused to  
live in the home of complainant; that on March 10, 1935, complainant  
came to her home intoxicated and drunk and threatened to take the  
children from her and she is requested to have all this on a hear-  
ing; that she has no money to pay moving expenses and rent if a  
bill of assistance is granted complainant; that she has not been  
served with any copy of the decree and that she appeals to the  
court for protection and assistance at the court so as not to be  
in her distress and misfortune.

Attached to this petition is the affidavit of one of the

defendant's solicitors, Ernest Stout, in which he says that he watched this case in the Law Bulletin and on the contested trial calendar; that he observed that there were a number of cases ahead of it; that on the day when the case came on for hearing on a petition for solicitors' fees, he had an agreement with the solicitor for complainant that they would both watch the call of the case and would notify each other when the case would be reached for trial; that in the event either one of them would miss the call, the case would not proceed to trial without such notice, and that he relied on this agreement and was taken by surprise when after the February term of court had passed he called complainant's solicitor concerning the time the case would be called for trial and was informed it had been tried February 7th and a decree entered; that the statement made to the court that he had abandoned the case of defendant was not true, but that together with his associate he had made preparation to try it; that he believes a great injustice and wrong has been done defendant and that she has a meritorious defense to the charge of adultery made against her.

The affidavit of William S. Stahl, another solicitor of defendant, states that after the case had been set for trial he watched the call from day to day and week to week during December, January and February; that on several occasions he went over to the court and checked up on the case, endeavoring to find out when it should be reached; that on February 6th he was engaged briefly in a contempt matter against a client of his which came on for hearing February 7th before Judge McDerty, and that he apparently overlooked the fact that this case appeared on the trial call on that day; that on subsequent days throughout the month of February and the first week in March he looked up the Law Bulletin for the trial call of the case; that he did not know until he was called up by defendant on or about March 12, 1933, and told that the case had been heard and a decree for divorce granted; that the statement that

[illegible]



defendant and her attorneys had abandoned the case was not true; that the court had been deceived and imposed upon; that there was an understanding and agreement between complainant's and defendant's solicitors that they would watch the Law Bulletin and that if either of the parties observed the case he would notify the other; that this agreement was made about the time the order was entered for \$75 on account of solicitors' fees; that he had taken up with the solicitor for complainant the question of whether they could use the testimony of defendant's mother, Mrs. Minnie Peterson, at a former trial, said witness having suffered a paralytic stroke; that the solicitor said he would look over the testimony and let him know; that he had never received an answer; that he and his associate had prepared to make a defense in the case and had checked up the witnesses and held conferences with defendant, and that it was believed a great injustice would be done if defendant is not given a hearing in the case. Solicitor for complainant filed an affidavit denying an agreement with solicitors for defendant, as averred in these affidavits.

May 3, 1933, defendant presented her bill for review in which she set up the whole proceedings in the former cause, together with all the evidence taken; that the decree was entered without notice, as was also an order for a writ of assistance. She points out that complainant's bill alleged that the real estate on which she resided was owned by both of them in joint tenancy, and that the prayer of the bill was that the property should be partitioned and sold; that in her answer to the bill she admitted that they were joint owners and averred that the property and building were purchased through their joint industry; that she made this same allegation in the cross bill and that complainant in his answer to the cross bill stated that he "admits that he and the cross-complainant hold joint title in the following described real estate, viz.": that the decree is therefore erroneous in

defendants and not otherwise had obtained the same was not true; that the court had been deceived and imposed upon; that there was an understanding and agreement between defendant's and defendant's solicitors that they would enter the law practice and that it should be the practice observed the case he would really the same; that this agreement was made about the time the order was entered for \$750 on account of defendant's fees; that he had taken up with the solicitor for defendant the question of whether they could not the testimony of defendant's counsel, Mrs. Minnie Peterson, as a former wife, said witness having suffered a paralytic stroke; that the solicitor said he would look over the testimony and let him know; that he had never received an answer; that he and his associate had prepared a memo a return in the case and had checked up the witnesses and held conferences with defendant, and that it was believed a great injustice would be done if defendant is not given a hearing in the case. Solicitor for defendant filed an affidavit denying an agreement with solicitors for defendant, as asserted in these affidavits.

May 3, 1915, defendant presented her bill for review in which she set up the whole proceedings in the former cases, to-wit: that with all the evidence taken; that the decree was entered without notice, as was also an order for a writ of assistance. She claims that defendant's bill alleged that she had estate on which she resided was owned by both of them in joint tenancy, and that the prayer of the bill was that the property should be partitioned and sold; that in her answer to the bill she admitted that they were joint owners and asserted that the property and building were purchased through their joint industry; that she made this same allegation in the cross bill and was complained in his answer to the cross bill after that he "admits that he and the cross-complainant held joint title in the lot being described and estate, viz.": that the decree is therefore erroneous in

finding that the title was taken for convenience, and that she should convey the same to him, etc.

Mrs. Lehman contends in the first place that the court exceeds its jurisdiction in that the prayer of the bill was to partition and sell the real estate, alleging that the same was held in joint tenancy, while the decree finds the land to be the exclusive property of complainant, a claim not made in the bill; that the manner in which the decree was obtained amounted to a fraud on the court; that the entry of the decree without notice was fatal to the jurisdiction of the court and that the court erred in refusing to grant the motion to vacate the decree and in denying to her the right to file her bill of review.

Complainant has appeared by his solicitors in this court and requested and obtained additional time in order to answer the brief of defendant. He has not, however, seen fit to make use of the privilege thus granted, although requested but not ordered so to do. In the absence of any assistance by a brief from the party who obtained the decree, we are disposed to follow the rules of this court that a statement made by an appellant may be taken as accurate and sufficient unless the opposing party points out wherein it is inaccurate or insufficient.

The failure to give notice to defendant of the entry of the decree as prepared after the hearing as required by the rules of the court, the seriousness of the charges made against defendant and her evident intention, manifested at all times, to defend against them, the interest of these minor children which it is the duty of the State to protect, the fact that the decree without prior notice and without even the claim being made in the bill deprives defendant and her family of the home in which she resides, the evident purpose to conceal the fact during the term the decree had been entered, - all constituted fraud upon the jurisdiction of the court which cannot be



Florida that the title the same was transferred, and that the

should convey the same to him, etc.

Mrs. Johnson contends in the first place that the court ex-

ceeds its jurisdiction in that the prayer of the bill was to partici-  
pate and sell the real estate, alleging that the same was held in  
joint tenancy, while the decree states that it was held in  
property of co-ownership, a claim not made in the bill; that the non-  
non is when the decree was obtained amounted to a fraud on the  
court; that the entry of the decree without notice was fatal to the  
jurisdiction of the court and that the court acted in retaining to  
grant the motion to vacate the decree and in granting as her the

right to file her bill at any time.

Complainant has appeared by his solicitors in this court and  
requested and obtained additional time in which to answer the bill.  
of defendant. He has not, however, seen fit to make any of the  
privilege thus granted, although requested but has chosen to do so.  
In the absence of any evidence by a trial from the party who op-  
posed the decree, we are disposed to follow the rules of this court  
that a statement made by an affidavit may be taken as accurate and  
sufficient unless the opposing party points out wherein it is inac-  
curate or insufficient.

The failure to file the motion to set aside the entry of the  
decree as presented after the hearing as required by the rules of the  
court, the correctness of the charges made against defendant and her  
rights reserved, sufficient of all that we intend to do in this  
the interest of those minor children which is in the duty of the  
State to protect, the fact that the decree without notice and  
without even the claim being made in the bill deprives defendant and  
her family of the same in which she resides, the evident purpose to  
seize the fact during the term the decree had been entered, - all  
considered from the jurisdiction of the court which would be

tolerated. The authorities are overwhelming to the effect that even after the term a judgment or decree entered under such circumstances will be set aside. Caswell v. Caswell, 130 Ill. 335; Burton v. Perry, 146 Ill. 102; North Avenue Bldg. Assoc. v. Huber, 286 Ill. 375, and see numerous authorities cited. American & English Ency. of Law, vol. 17, pp. 325 to 327.

For these reasons the order denying defendant's motion to set aside the decree will be reversed and the cause remanded with directions to the chancellor to set the decree aside and the cause for hearing on the merits.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor and McSurely, JJ., concur.

colored. The authorities are unwilling to the effect that

even after the term a judgment or decree entered under such cir-

cumstances will be not valid. Garrett v. Garrett, 130 Ill. 382;

Hutton v. Hutton, 140 Ill. 100; Smith v. Smith, 140 Ill. 100.

Ill. 111. 375, and see numerous authorities cited. American & English

ency. of law, vol. IV, pp. 382 to 387.

For these reasons the order denying defendant's motion to

set aside the decree will be reversed and the cause remanded with

direction to the chancellor to set the decree aside and the

cause be retried on the merits.

REVEREND AND HONORABLE THE CHIEF JUSTICE.

REVEREND AND HONORABLE THE CHIEF JUSTICE.



37187

GUSTAVE E. LOVENHORN, as Administrator  
of the Estate of ~~JOHN LOVENHORN~~, Deceased.  
Defendant in Error.

vs.

EMIL DAHLBERG,  
Plaintiff in Error.

ERROR TO MUNICIPAL  
COURT OF CHICAGO.

274 I.A. 665<sup>1</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

In an action on contract of the first class in the Municipal court, at the close of all the evidence, upon motion of plaintiff the court instructed the jury to return a verdict in favor of plaintiff for \$7458.50, overruled motions of defendant for a judgment in his favor non obstante veredicto and entered judgment for that amount. Defendant prayed an appeal, which was allowed on filing a bond for \$8000. The appeal was not perfected, but this writ of error of a later date was issued out. Defendant argues that the judgment should be reversed.

The statement of claim in substance averred that December 13, 1927, Elizabeth F. Uhl, as evidence of a just indebtedness, executed two promissory notes described as A and B; that A was for the sum of \$500 due two years after date, and B for the sum of \$7000, due five years after date; that both notes provided that until maturity they would draw interest at 6% per annum and after maturity at 7% per annum; that to secure the payment of these notes she, on the same date, conveyed to Henry F. Jaeger as trustee certain premises situated in Cook county, Illinois; that this indebtedness remaining unpaid, Mrs. Uhl on February 20, 1929, by warranty deed conveyed these premises to defendant Emil Dahlberg and his wife, Mathilda, since deceased; that defendant accepted the deed and then and thereby assumed and agreed to pay the indebtedness; that plaintiff is the owner of the note for \$7000 and the interest coupon

QUESTIONS AS TO THE  
OF THE STATE OF NEW YORK  
IN THE

TO BE  
OF THE

vs.

WILLIAMSON, Plaintiff in Error.

274 I.A. 662

MR. WILLIAMSON'S EXHIBIT  
RECEIVED THE OFFICE OF THE COURT

In an action on account of the first class in the municipal  
court, at the close of all the evidence, upon motion of plaintiff  
the court instructed the jury to return a verdict in favor of plain-  
tiff for \$1488.00, overpaid portion of defendant's tax a judgment in  
his favor and plaintiff's verdict and entered judgment for that  
amount. Defendant prayed an appeal, which was allowed on filing a  
bond for \$5000. The appeal was not perfected, but this writ of  
error of a later date was made out. Defendant argues that the  
judgment should be reversed.

The statement of claim in defendant's answer that December  
13, 1897, Elizabeth F. Hall, an attorney at a first habitation,  
executed two promissory notes described as A and B; that A was  
for the sum of \$500 and two years after date, and B for the sum of  
\$7500, and five years after date; that both notes provided that  
until maturity they would bear interest at 6 per annum and after  
maturity at 7 per annum; that he secured the payment of these notes  
and, on the same date, conveyed to Henry F. Jaeger as trustee cer-  
tain premises situated in Cook County, Illinois; that this indebted-  
ness remaining unpaid, was, only on February 20, 1902, by twenty  
good conveyed these premises to defendant Emil Dahlborg and his  
wife, Mathilde, since deceased; that defendant accepted the deed  
and then and shortly thereafter agreed to pay the indebtedness; and  
plaintiff is the owner of the note for \$7500 and the interest coupon

representing interest which matured thereon December 13, 1932, in the sum of \$210. The statement averred that plaintiff claimed \$7210, with interest at the rate of 7% per annum from December 13, 1932. Copies of the principal note, interest note and warranty deed were attached to the statement of claim and made a part of it.

Defendant filed an affidavit of merits which was stricken and later an amended affidavit which in substance averred that he and his wife Catalda merely purchased from Mrs. Uhl, a widow, on February 20, 1929, her equity in the real estate described; that neither defendant nor his wife assumed and agreed to pay any indebtedness secured by any encumbrance as part of the consideration relating to the purchase; that it was never understood and agreed between Elizabeth F. Uhl and defendant and his late wife that they should assume and agree to pay any encumbrances referred to, and in particular that they did not assume or agree to pay the indebtedness secured by the trust deed to Jaeger.

Defendant averred he was born in Sweden and reads English with great difficulty; that he was not represented by any attorney or person having knowledge of real estate matters in the transaction in question; that an attorney of the law firm representing plaintiff took and recorded the warranty deed without reading or explaining the nature of its contents to defendant or his wife; that he did not read the deed and did not know and was not informed that it contained any alleged assumption and agreement on their part to pay any indebtedness secured by existing encumbrances, and defendant never was willing to accept and would not knowingly accept any warranty deed containing such assumption; that the grantor in the warranty deed was not entitled to have inserted any such assumption because the grantor had not bargained for the same; that the indebtedness was inserted in the warranty deed through fraud or inadvertence and was not binding.



...the sum of \$210. The statement averred that plaintiff claimed \$210, with interest at the rate of 12 per annum from December 18, 1921. Copies of the original note, interest note and warranty deed were attached to the statement of claim and made a part of it. Defendant filed an affidavit of service which was returned and later an amended affidavit which is reproduced averred that he and his wife Lucille early purchased from Mrs. M. J. a widow, on February 20, 1921, for only in the real estate business; that neither defendant nor his wife assumed and agreed to pay any indebtedness secured by any encumbrance on part of the consideration relating to the purchase; that it was never understood and agreed between Elizabeth J. M. and defendant and his late wife that they should assume and agree to pay any encumbrances referred to, and in particular that they did not assume or agree to pay the indebtedness secured by the deed back to Jager. Defendant averred he was born in Sweden and speaks English with great fluency; that he was not represented by any attorney or person having knowledge of real estate matters in the transaction in question; that an attorney at the law firm representing plaintiff took and removed the warranty deed without reading or explaining the nature of its contents to defendant or his wife; that he did not read the deed and did not know and was not informed that it contained any alleged assumption and agreement on their part to pay any indebtedness secured by existing encumbrances, and defendant never was willing to accept and would not knowingly accept any warranty deed containing such assumption; that the grantor in the warranty deed was not entitled to have inserted any such assumption because the grantor had not bargained for the same; that the indebtedness was inserted in the warranty deed through fraud or misstatement and was not binding.

The amended affidavit of merits further averred that he first obtained knowledge of this assumption clause in the deed in October, 1932, and thereupon he was and still is ready, willing and able to rescind the deal for the purchase of the equity but that Elizabeth F. Uhl is unable to return any consideration paid by him for the conveyance to him and his wife.

The affidavit set up the further defense that the notes no longer evidence any existing indebtedness, because plaintiff brought suit on these notes against Elizabeth F. Uhl and judgment was entered in favor of plaintiff against her upon said notes and the notes have been merged in the judgment; that defendant did not know whether plaintiff was still the owner of the judgment.

The cause was tried by a jury with results as heretofore stated. Defendant contends in the first place that when a judgment has been taken on a promissory note, the note becomes merged into the judgment; that it is no longer evidence of indebtedness, and thereafter no suit at law can be maintained on such note. He cites authority such as Hart v. Seymour, 147 Ill. 593; Jocelyn v. White, 201 Ill. 16; Beare v. Nichols, 123 Ill. App. 449; Kelley v. Marks, 264 Ill. App. 402.

The general rule of law for which defendant contends is not to be controverted. When a note is put in judgment, the note is, of course, merged in the judgment. However, here, plaintiff's suit is not brought on the notes. The suit is brought upon the alleged promise of defendant to assume and pay the encumbrances which existed against the property at the time he received his deed and which are described in the deed. The mere fact that a judgment has been entered upon notes does not render them incompetent evidence for the purpose of proving any material fact. That was the purpose for which we assume they were admitted here. Such notes, although merged in a judgment, remain competent as items of evidence so far

[illegible]



as they are material to the issues. Brown v. Whiting, 203 Ill. 136.

In view of the instruction given by the court at the close of all the evidence, the controlling question in the case is whether under the evidence as a matter of law plaintiff is entitled to recover from defendant the amount of the judgment. The facts are practically undisputed. On and prior to February 5, 1939, Elizabeth F. Uhl was the owner of the real estate described, which is improved with a two-flat building. It was subject to the trust deed described in the statement of claim and a junior mortgage for \$2600. Defendant and his wife Matilda owned a bungalow at 531 East 39th place, Chicago, and this property was encumbered by a mortgage for \$4000.

Mrs. Uhl and the Dahlbergs on that date entered into an agreement in writing by which Mrs. Uhl, party of the first part, in consideration of the covenants and agreements of the party of the second part, the Dahlbergs, agreed to convey to the Dahlbergs by statutory general warranty deed, including all estates of homestead and all rights of dower therein, at a consideration of \$16,000, the following described real estate," etc. The agreement recited:

"All interest, insurance premiums, taxes, etc., are to be pro-rated to date of closing. Section 31, Township 38 North, Range 14, East of the Third Principal Meridian. Subject to (1) all existing leases expiring as are, the purchaser to be entitled to the rents accruing after the delivery of the deed hereunder, (2) all general taxes levied after the year 1927; (3) all unpaid special taxes and assessments levied for improvements not completed at the date hereof, and any unpaid installments of special taxes and special assessments for improvements completed at the date hereof, falling due subsequent to the date hereof; (4) any party wall agreements of record, to building line restrictions and building restrictions of record, and to a first mortgage of \$7500.00, \$500.00 due December 13, 1929 and the balance of \$7000.00 due December 13, 1932, with interest at the rate of 5% per annum, payable semi-annually; and to an unpaid balance of second mortgage of approximately \$2600.00, due and payable at the rate of \$100.00 per month or more, and interest at the rate of 5% per annum, payable monthly."

The Dahlbergs on their part agreed to convey by statutory general warranty deed, including all estates of homestead and rights of dower, for a consideration of \$5000, the bungalow at 531 East

as they are referred to the issue, Brown v. Board of Education, 347 U.S. 483, 1954.

In view of the instructions given by the court at the close of all the evidence, the concluding remark on the case is whether the evidence is sufficient to sustain a conviction of the crime charged.

*[Faint mirrored text from reverse side]*

Each of the above described items was the property of the owner of the items described, which is

Investment with a two-fold increase in the number of units and a 50% increase in the number of units.

to' question what a law aims to accomplish and if authorized

100 to 100,000 a day, and the other 100 to 100,000 a day.

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THE UNIVERSITY OF CHICAGO LIBRARY

James Earl Ray: FBI # 44-38861-1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 1175, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1196, 1197, 1198, 1199, 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276, 1277, 1278, 1279, 1280, 1281, 1282, 1283, 1284, 1285, 1286, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1294, 1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1332, 1333, 1334, 1335, 1336, 1337, 1338, 1339, 1340, 1341, 1342, 1343, 1344, 1345, 1346, 1347, 1348, 1349, 1350, 1351, 1352, 1353, 1354, 1355, 1356, 1357, 1358, 1359, 1360, 1361, 1362, 1363, 1364, 1365, 1366, 1367, 1368, 1369, 1370, 1371, 1372, 1373, 1374, 1375, 1376, 1377, 1378, 1379, 1380, 1381, 1382, 1383, 1384, 1385, 1386, 1387, 1388, 1389, 1390, 1391, 1392, 1393, 1394, 1395, 1396, 1397, 1398, 1399, 1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412, 1413, 1414, 1415, 1416, 1417, 1418, 1419, 1420, 1421, 1422, 1423, 1424, 1425, 1426, 1427, 1428, 1429, 1430, 1431, 1432, 1433, 1434, 1435, 1436, 1437, 1438, 1439, 1440, 1441, 1442, 1443, 1444, 1445, 1446, 1447, 1448, 1449, 1450, 1451, 1452, 1453, 1454, 1455, 1456, 1457, 1458, 1459, 1460, 1461, 1462, 1463, 1464, 1465, 1466, 1467, 1468, 1469, 1470, 1471, 1472, 1473, 1474, 1475, 1476, 1477, 1478, 1479, 1480, 1481, 1482, 1483, 1484, 1485, 1486, 1487, 1488, 1489, 1490, 1491, 1492, 1493, 1494, 1495, 1496, 1497, 1498, 1499, 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, 1508, 1509, 1510, 1511, 1512, 1513, 1514, 1515, 1516, 1517, 1518, 1519, 1520, 1521, 1522, 1523, 1524, 1525, 1526, 1527, 1528, 1529, 1530, 1531, 1532, 1533, 1534, 1535, 1536, 1537, 1538, 1539, 1540, 1541, 1542, 1543, 1544, 1545, 1546, 1547, 1548, 1549, 1550, 1551, 1552, 1553, 1554, 1555, 1556, 1557, 1558, 1559, 1560, 1561, 1562, 1563, 1564, 1565, 1566, 1567, 1568, 1569, 1570, 1571, 1572, 1573, 1574, 1575, 1576, 1577, 1578, 1579, 1580, 1581, 1582, 1583, 1584, 1585, 1586, 1587, 1588, 1589, 1590, 1591, 1592, 1593, 1594, 1595, 1596, 1597, 1598, 1599, 1600, 1601, 1602, 1603, 1604, 1605, 1606, 1607, 1608, 1609, 1610, 1611, 1612, 1613, 1614, 1615, 1616, 1617, 1618, 1619, 1620, 1621, 1622, 1623, 1624, 1625, 1626, 1627, 1628, 1629, 1630, 1631, 1632, 1633, 1634, 1635, 1636, 1637, 1638, 1639, 1640, 1641, 1642, 1643, 1644, 1645, 1646, 1647, 1648, 1649, 1650, 1651, 1652, 1653, 1654, 1655, 1656, 1657, 1658, 1659, 1660, 1661, 1662, 1663, 1664, 1665, 1666, 1667, 1668, 1669, 1670, 1671, 1672, 1673, 1674, 1675, 1676, 1677, 1678, 1679

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Don't let us mislead you. As always, we'll be right at your side.

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1-10 (S), 1-11 (S), 1-12 (S), 1-13 (S), 1-14 (S), 1-15 (S), 1-16 (S), 1-17 (S), 1-18 (S), 1-19 (S), 1-20 (S), 1-21 (S), 1-22 (S), 1-23 (S), 1-24 (S), 1-25 (S), 1-26 (S), 1-27 (S), 1-28 (S), 1-29 (S), 1-30 (S), 1-31 (S), 1-32 (S), 1-33 (S), 1-34 (S), 1-35 (S), 1-36 (S), 1-37 (S), 1-38 (S), 1-39 (S), 1-40 (S), 1-41 (S), 1-42 (S), 1-43 (S), 1-44 (S), 1-45 (S), 1-46 (S), 1-47 (S), 1-48 (S), 1-49 (S), 1-50 (S), 1-51 (S), 1-52 (S), 1-53 (S), 1-54 (S), 1-55 (S), 1-56 (S), 1-57 (S), 1-58 (S), 1-59 (S), 1-60 (S), 1-61 (S), 1-62 (S), 1-63 (S), 1-64 (S), 1-65 (S), 1-66 (S), 1-67 (S), 1-68 (S), 1-69 (S), 1-70 (S), 1-71 (S), 1-72 (S), 1-73 (S), 1-74 (S), 1-75 (S), 1-76 (S), 1-77 (S), 1-78 (S), 1-79 (S), 1-80 (S), 1-81 (S), 1-82 (S), 1-83 (S), 1-84 (S), 1-85 (S), 1-86 (S), 1-87 (S), 1-88 (S), 1-89 (S), 1-90 (S), 1-91 (S), 1-92 (S), 1-93 (S), 1-94 (S), 1-95 (S), 1-96 (S), 1-97 (S), 1-98 (S), 1-99 (S), 1-100 (S)

Leasehold houses are also included in the survey.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

1997-1998 2000-2001 2002-2003 2004-2005 2006-2007 2008-2009 2010-2011 2012-2013 2014-2015 2016-2017 2018-2019 2020-2021 2022-2023 2024-2025 2026-2027 2028-2029 2030-2031 2032-2033 2034-2035 2036-2037 2038-2039 2040-2041 2042-2043 2044-2045 2046-2047 2048-2049 2050-2051 2052-2053 2054-2055 2056-2057 2058-2059 2060-2061 2062-2063 2064-2065 2066-2067 2068-2069 2070-2071 2072-2073 2074-2075 2076-2077 2078-2079 2080-2081 2082-2083 2084-2085 2086-2087 2088-2089 2090-2091 2092-2093 2094-2095 2096-2097 2098-2099 2100-2101 2102-2103 2104-2105 2106-2107 2108-2109 2110-2111 2112-2113 2114-2115 2116-2117 2118-2119 2120-2121 2122-2123 2124-2125 2126-2127 2128-2129 2130-2131 2132-2133 2134-2135 2136-2137 2138-2139 2140-2141 2142-2143 2144-2145 2146-2147 2148-2149 2150-2151 2152-2153 2154-2155 2156-2157 2158-2159 2160-2161 2162-2163 2164-2165 2166-2167 2168-2169 2170-2171 2172-2173 2174-2175 2176-2177 2178-2179 2180-2181 2182-2183 2184-2185 2186-2187 2188-2189 2190-2191 2192-2193 2194-2195 2196-2197 2198-2199 2200-2201 2202-2203 2204-2205 2206-2207 2208-2209 2210-2211 2212-2213 2214-2215 2216-2217 2218-2219 2220-2221 2222-2223 2224-2225 2226-2227 2228-2229 2230-2231 2232-2233 2234-2235 2236-2237 2238-2239 2240-2241 2242-2243 2244-2245 2246-2247 2248-2249 2250-2251 2252-2253 2254-2255 2256-2257 2258-2259 2260-2261 2262-2263 2264-2265 2266-2267 2268-2269 2270-2271 2272-2273 2274-2275 2276-2277 2278-2279 2280-2281 2282-2283 2284-2285 2286-2287 2288-2289 2290-2291 2292-2293 2294-2295 2296-2297 2298-2299 2300-2301 2302-2303 2304-2305 2306-2307 2308-2309 2310-2311 2312-2313 2314-2315 2316-2317 2318-2319 2320-2321 2322-2323 2324-2325 2326-2327 2328-2329 2330-2331 2332-2333 2334-2335 2336-2337 2338-2339 2340-2341 2342-2343 2344-2345 2346-2347 2348-2349 2350-2351 2352-2353 2354-2355 2356-2357 2358-2359 2360-2361 2362-2363 2364-2365 2366-2367 2368-2369 2370-2371 2372-2373 2374-2375 2376-2377 2378-2379 2380-2381 2382-2383 2384-2385 2386-2387 2388-2389 2390-2391 2392-2393 2394-2395 2396-2397 2398-2399 2400-2401 2402-2403 2404-2405 2406-2407 2408-2409 2410-2411 2412-2413 2414-2415 2416-2417 2418-2419 2420-2421 2422-2423 2424-2425 2426-2427 2428-2429 2430-2431 2432-2433 2434-2435 2436-2437 2438-2439 2440-2441 2442-2443 2444-2445 2446-2447 2448-2449 2450-2451 2452-2453 2454-2455 2456-2457 2458-2459 2460-2461 2462-2463 2464-2465 2466-2467 2468-2469 2470-2471 2472-2473 2474-2475 2476-2477 2478-2479 2480-2481 2482-2483 2484-2485 2486-2487 2488-2489 2490-2491 2492-2493 2494-2495 2496-2497 2498-2499 2500-2501 2502-2503 2504-2505 2506-2507 2508-2509 2510-2511 2512-2513 2514-2515 2516-2517 2518-2519 2520-2521 2522-2523 2524-2525 2526-2527 2528-2529 2530-2531 2532-2533 2534-2535 2536-2537 2538-2539 2540-2541 2542-2543 2544-2545 2546-2547 2548-2549 2550-2551 2552-2553 2554-2555 2556-2557 2558-2559 2560-2561 2562-2563 2564-2565 2566-2567 2568-2569 2570-2571 2572-2573 2574-2575 2576-2577 2578-2579 2580-2581 2582-2583 2584-2585 2586-2587 2588-2589 2590-2591 2592-2593 2594-2595 2596-2597 2598-2599 2600-2601 2602-2603 2604-2605 2606-2607 2608-2609 2610-2611 2612-2613 2614-2615 2616-2617 2618-2619 2620-2621 2622-2623 2624-2625 2626-2627 2628-2629 2630-2631 2632-2633 2634-2635 2636-2637 2638-2639 2640-2641 2642-2643 2644-2645 2646-2647 2648-2649 2650-2651 2652-2653 2654-2655 2656-2657 2658-2659 2660-2661 2662-2663 2664-2665 2666-2667 2668-2669 2670-2671 2672-2673 2674-2675 2676-2677 2678-2679 2680-2681 2682-2683 2684-2685 2686-2687 2688-2689 2690-2691 2692-2693 2694-2695 2696-2697 2698-2699 2700-2701 2702-2703 2704-2705 2706-2707 2708-2709 2710-2711 2712-2713 2714-2715 2716-2717 2718-2719 2720-2721 2722-2723 2724-2725 2726-2727 2728-2729 2730-2731 2732-2733 2734-2735 2736-2737 2738-2739 2740-2741 2742-2743 2744-2745 2746-2747 2748-2749 2750-2751 2752-2753 2754-2755 2756-2757 2758-2759 2760-2761 2762-2763 2764-2765 2766-2767 2768-2769 2770-2771 2772-2773 2774-2775 2776-2777 2778-2779 2780-2781 2782-2783 2784-2785 2786-2787 2788-2789 2790-2791 2792-2793 2794-2795 2796-2797 2798-2799 2800-2801 2802-2803 2804-2805 2806-2807 2808-2809 2810-2811 2812-2813 2814-2815 2816

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CONFIDENTIAL

The following information was obtained from the records of the Department of Social Services, State of New York, Office of the Commissioner of Social Services, dated December 18, 1967.

108A, with reference to the rate of \$ per annum, payable semi-annually.

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FROM THE DEPT. OF THE ARMY, WASHINGTON, D. C., MAY 1, 1914.

\* 1997-2000, 2002-2003, 2005-2006, 2008-2009, 2011-2012, 2014, 2016-2017

The following proposals of various of Beijing Jiang listed as approved on 11/11/1994:

to assist and encourage in order to maintain, and

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1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26



39th place, the contract containing a notation of the right to insert the legal description of the premises later. The agreement further provided that this conveyance should be subject to existing leases, general taxes, unpaid special taxes and assessments and party wall agreements and building line restrictions of record "and to a first mortgage of \$4000, \$2200 due in July, 1929, \$900 in July, 1930, and the balance of \$3500 due in July, 1931, with interest at the rate of 6% per annum, payable semi-annually." The Dahlbergs also agreed to pay at the date of the delivery of the deeds the sum of \$1900 cash. The parties further agreed that each would furnish certificate of title, merchantable abstract of title, or merchantable guaranty policy to the respective premises to be conveyed. The contract contained other usual provisions of the real estate board form of contract and was executed by the respective parties under seal. Pursuant to that contract on February 28, 1929, Elizabeth F. Uhl executed a warranty deed of that date conveying to Dahlberg and his wife, for a consideration of \$10 and other good and valuable considerations, as joint tenants the property owned by her. The deed stated that it was "subject to all taxes and assessments due after the year 1928, and to a first mortgage of \$7500 secured by trust deed to Henry F. Jaeger, trustee, dated December 13, 1927, Document No. 9871557, and to the unpaid balance of the junior mortgage trust deed to Henry F. Jaeger, Trustee, dated April 19, 1928, Document No. 9993030, all of which the grantee herein assumed and agreed to pay." The deed was duly signed and acknowledged before a notary public and recorded in the recorder's office of Cook county on February 25, 1929.

The transaction between these parties seems to have been closed March 3, 1929, at the Guarantee Trust & Savings Bank, now a part of the Chicago City Bank & Trust Co. Mr. Rieffer, who was the attorney for the bank, took care of the transaction, and Mrs. Uhl testified, "Mr. Rieffer explained the things to us." A statement



1934. The contract contained a provision of the right to assign the legal possession of the premises later. The agreement further provided that this assignment should be subject to existing liens, general taxes, unpaid special taxes and assessments and party with agreement and binding line restrictions of record "and to a first mortgage of \$1000, 1934 and in July, 1934, 1934 in July, 1934, and the balance of 1934 and in July, 1934, with interest at the rate of 6% per annum, payable semi-annually." The parties also agreed to pay at the date of the delivery of the deeds the sum of \$1900 cash. The parties further agreed that each would furnish with the deed a certificate of title, as required by the respective policy of the respective policies to be conveyed. The contract contained other usual provisions of the real estate board form of contract and was executed by the respective parties under seal. Pursuant to that contract on February 23, 1934, Elizabeth F. Hill executed a primary deed of land date conveying to Pauline and her heirs, for a consideration of five and other good and valuable considerations, as legal tenants the property owned by her. The deed stated that it was subject to all taxes and assessments then due the year 1934, and to a first mortgage of \$1000 secured by deed to Henry F. Wagner, trustee, dated December 12, 1934, Document No. 807127, and to the unpaid balance of the first mortgage from deed to Henry F. Wagner, trustee, dated April 10, 1934, Document No. 807127, all of which the transferee herein agreed to satisfy. The deed was duly signed and acknowledged before a notary public and recorded in the recorder's office of Cook County on February 23, 1934.

The transaction between these parties seems to have been closed March 4, 1934, at the Chicago Trust & Savings Bank, now a part of the Chicago City Bank & Trust Co. Mr. Miller, who was the attorney for the bank, took care of the transaction, and after the deed, Mr. Miller explained the things to me. A statement

(prepared by the attorney) was rendered of the transaction. Mrs. Uhl was named as the seller and was credited with the purchase price of her real estate, \$10,000, and was charged with items such as taxes, insurance, etc., of the total amount of \$10,050.01 and debited with a first mortgage of \$7500, a second mortgage of \$2000, accrued interest on the first mortgage of \$83.75, accrued interest on the second mortgage of \$8.66, general taxes prorated \$131.21, special assessments of \$1500, cash paid \$5,639.99. The parties shared the expense of Mr. Rieffer's services, he, apparently, representing both of them.

Bahlberg's testimony is to the effect that nothing whatever was said at any time about the payment of the encumbrances on the premises conveyed. The deed from Mrs. Uhl to the Bahlbergs was taken to the recorder's office and after being recorded was deposited in the box belonging to the Guarantee Trust & Savings Bank. Bahlberg says that the deed was taken to the recorder's office by some employee of that bank. The original contract for the exchange of these properties was drawn by a clerk in the bank and was signed by Bahlberg there. He says that nothing was said about paying the mortgage on the Uhl property; that he never read anything in the deed when he got it at the bank and that he did not know about the assumption clause in the deed until he was sued. At the time of the trial he was 72 years of age. He was born in Sweden and was 23 years of age when he came to this country. He left the preparation of the deed and the statements to Mr. Rieffer, to whom both he and Mrs. Uhl paid attorney's fees. He has owned some real estate, owned a store on Halsted street, built three buildings and had been in the hardware business for about 25 years. He got the deed from the bank after it was recorded, took possession of the two-flat building, rented out the top flat to Mrs. Uhl for six months, collected the rents from the other flat and paid taxes for the years 1928 and 1929,

(procured by the attorney) was recorded at the same time.

UHL was named as the owner and was credited with the purchase price of her real estate, \$10,000, and was charged with items such as taxes, insurance, etc., of the total amount of \$12,000.00 and debited with a first mortgage of \$7,000.00, a second mortgage of \$3,000.00, interest on the first mortgage of \$22.75, interest on the second mortgage of \$22.50, general taxes of \$12.50, and a special assessment of \$100.00, was paid \$12,450.00. The parties stated the amount of \$12,450.00 was paid to the attorney, who received both of them.

Uhlberg's testimony is to the effect that nothing was said at any time about the payment of the encumbrances on the premises conveyed. The deed from UHL to the bank was taken to the recorder's office and after being recorded was deposited in the box belonging to the bank and a key was given to Uhlberg. He says that the deed was taken to the recorder's office by some employee of that bank. The original contract for the purchase of these premises was drawn by a clerk in the bank and was signed by Uhlberg. He says that nothing was said about paying the mortgage on the UHL property; that he never read anything in the deed when he got it at the bank and that he did not know about the assumption clause in the deed until he was sued. At the time of the trial he was 38 years of age. He was born in Sweden and was 23 years of age when he came to this country. He left the protection of the deed and the estate to Mr. Uhlberg, to whom both he and Mrs. UHL said attorney's fees. He has owned some real estate, owned a store on Main Street, built three buildings and had been in the bank for business for about 25 years. He got the deed from the bank after it was recorded, took possession of the premises and rented out the top floor to Mrs. UHL for six months, collected the taxes that the bank had paid and gave her the deed and the



the second mortgage of \$2600 on the property, \$500 on the first mortgage and the interest every six months on the first mortgage until the December prior to the trial. He received from the bank a copy of the statement and noticed that it said, "First mortgage \$7500."

The question for determination here is whether on the uncontradicted evidence defendant is liable. As already said, he is, of course, not liable on the notes because he did not execute them, and if he is to be held liable it must be by reason of the contract, express or implied, whereby he assumed and agreed to pay the encumbrances against the property he received from Mrs. Chl.

In the comparatively early case of Comstock v. Hitt, 37 Ill. 542, our Supreme court said after reviewing authorities from other states:

"All the cases cited on this point are to the same effect. Where the payment of an outstanding mortgage is part of the purchase price of the land, the law will imply an agreement to pay it. This case is entirely different."

In Drury v. Holden, 121 Ill. 130, the court said in substance that when a party purchased premises which are encumbered and assumed the payment of the indebtedness as a part of the purchase money, the premises purchased were in his hands a primary fund for the payment of the debt, and that it was his duty to pay it, and added: "And the rule is the same, although there be no assumption of payment of the indebtedness, if the purchase be made expressly subject to the incumbrances, and the amount of the indebtedness thereby secured is included in and forms a part of the consideration of the conveyance. Lilly v. Palmer, *supra*; Comstock v. Hitt, 37 Ill. 542; Fowler v. Jay, 62 id. 375; Russell v. Fistar, *supra*; Ferris v. Crawford, 2 Denio, 593." This seems to be the rule followed in subsequent cases.

Defendant cites Repp v. Stoner, 104 Ill. 612, where there was a contract between the parties for the exchange of land. The





conveyance stated that the title was conveyed subject to the encumbrances. The deed there, unlike this one, however, did not contain any clause which assumed and agreed to pay.

Defendant also cites Diegel v. Berland, 191 Ill. 107, where there had likewise been an exchange of property and several subsequent grantees. The court said, citing authorities:

"To sustain the decree, the facts proved must amount to an agreement to pay the \$25,000 upon the debt secured by the trust deed. It is true that a contract may be implied, and that if the amount of an encumbrance is included in and forms a part of the consideration which a grantee promises to pay for premises, and he retains that part of the purchase price, the law will create a personal liability against him, on the ground that he has agreed to pay such indebtedness. In such a case the law presumes that the grantee has agreed to apply the money so retained for the purpose of paying the encumbrance. Either there must be an express assumption of the indebtedness, or the amount must be allowed in the purchase price so that the law will imply the promise."

The defendants there were not held liable, the opinion pointing out that "neither in the contract nor in the deed, nor in the subsequent deed to the Siegelz, was there any assumption whatever of the debt secured by the trust deed or any agreement to pay it or any part of it."

Ray v. Lobdell, 213 Ill. 389, is cited by defendant, but that is a case where the title to the property conveyed was taken in trust for certain creditors at an agreed price and the party taking title was held not liable under the circumstances. The court said:

"The rule to be deduced from the authorities is, if the vendee of land encumbered by mortgage or trust deed purchases only the vendor's equity of redemption, he is not personally liable to pay the encumbrance resting upon the land unless he expressly assumed and agreed to pay the same. If, however, he purchases land for its full value and retains in his hands, out of the consideration, a sufficient sum to satisfy the encumbrance, he may be held personally liable for the payment thereof, even though he has not expressly agreed to pay the encumbrance resting upon the land."

The deed in this case did not contain any agreement that the grantee should assume the encumbrances.

In Thompson v. Dearborn, 107 Ill. 92, the question was



[illegible]

There has likewise been an exchange of property and several other

[illegible]

The following evidence was obtained from the above sources:

[illegible][illegible]

...and ... ..

Small, dark, and very old. The

[illegible]

The first is that we are not alone in our struggle.

in London, 1844, 1845, 1846, 1847, 1848, 1849, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525

whether a defendant who had defaulted could be held liable upon a foreclosure for a deficiency decree. The court held against the contention of the defendant that the statute of frauds was not applicable, but as the bill did not allege that the defendant had signed or sealed his deed, or that the deed was delivered to him and he had accepted it, he was held not liable. That case also held that the mere recording of the deed did not constitute an acceptance under the circumstances there appearing, although three of the Judges dissented. Similar in effect was Kraidler v. Hyde, 120 Ill. App. 505, which defendant also cites.

In Leinold v. Epier, 198 Ill. App. 618, the defendant was held not liable where it appeared that the clause was fraudulently placed in the deed by the agent of the plaintiff. The defendant was also held not liable in Merriman v. Schmitt, 211 Ill. 263, where the purported deed which contained the assumption clause was in fact not an absolute deed but a mortgage and had never been in fact delivered.

Wilson v. Mundy, 238 Ill. App. 575, is another case where the defendant was held not liable on a deficiency decree by the Appellate court for the Second district in an opinion which reviews many of the cases on this subject. It was undisputed there, however, that the question of whether the defendant should assume was discussed, and that the defendant had stated distinctly that he would not enter into any contract by which he would assume the mortgage. There was also evidence tending to show that the clause was inserted surreptitiously and without the defendant's knowledge. Moreover, it there appeared that the defendant had never recognized the indebtedness by making any payments on it.

The sum and substance of all the cases seems to be that where it appears that the transaction is in every respect free from fraud or mistake, and where it further appears that the purchase

whether a defendant who had been held liable upon a  
 verdict for a deficiency decree. The court held against the  
 contention of the defendant that the estate of Thomas was not  
 responsible, but on the bill it was alleged that the defendant had  
 signed or sealed his deed, or that the deed was delivered to him  
 and he had accepted it, he was held not liable. That case also  
 held that the mere recording of the deed did not constitute an  
 acknowledgment under the circumstances here involved. Although there  
 of the judges dissented. Similar in effect was Wheeler v. Wheeler,  
 100 Ill. App. 208, which defendant also cited.  
 In Wheeler v. Wheeler, 100 Ill. App. 210, the defendant was  
 held not liable where it appeared that the deed was recorded  
 placed in the deed by the agent of the plaintiff. The defendant  
 was also held not liable in Wheeler v. Wheeler, 211 Ill. 208,  
 where the purported deed which contained the assumption clause was  
 in fact not an absolute deed but a mortgage and had never been in  
 fact delivered.  
Wheeler v. Wheeler, 202 Ill. App. 277, is another case where  
 the defendant was held not liable on a deficiency decree of the  
 Appellate court for the reason stated in an opinion which reviews  
 many of the cases on this subject. It was suggested there, however,  
 that the question of whether the defendant should assume was dis-  
 cussed, and that the defendant had acted dishonestly but he would  
 not after all be held liable for which he would assume the mortgage.  
 There was also evidence tending to show that the clause was inserted  
 purposefully and against the defendant's knowledge. However,  
 it was pointed out that the defendant had never recorded the in-  
 struments of which the mortgage was one.  
 The sum and substance of all the cases seems to be that  
 where it appears that the transaction is in every respect true from  
 front or back, and that it is a bona fide transaction, the defendant



price of the property is definitely agreed upon and upon the completion of the transaction the encumbrance is treated by the parties as a part of the consideration and the grantee accepts a deed containing a specific agreement to pay the encumbrances and thereafter recognizes the obligation by making payments thereon, he will be held liable upon the theory that he has assumed and agreed to pay.

In Ludlum v. Pinckard, 304 Ill. 449, the defendant had been held liable by the trial court for a deficiency decree, and the Supreme court said that the only question involved in the case was whether or not the accepting of title to the property and taking the benefit of the rents arising therefrom, together with payment of \$1000 on the mortgage, amounted to an acceptance or ratification of the clause in the deed reciting that the conveyance was made subject to all encumbrances of record, which the grantee assumed and agreed to pay. The court then went on to say that such agreement must be based on sufficient consideration, and that something more than the mere insertion of the clause that the grantee assumed was necessary. The court said that unless it be shown that the grantee in a deed has some reason to suppose that the deed to him contained a personal contract on his part to pay a mortgage or other lien on the property transferred, and that he assented thereto, he cannot be held, as a matter of law, to have assumed such obligation, and

"Applying the above rules to the case at bar, we come to the question whether or not there is in the record evidence showing a delivery and acceptance of the deed containing the assumption clause and assent thereto. Defendant in error offered no evidence, and, as we have seen, the plaintiff in error's evidence shows that the defendant in error had nothing to do with the transfer of the property to her. There is no direct evidence showing that she knew anything about the assumption clause in the deed to her. She took title to the property, however, received the rents therefrom and paid taxes thereon, and while she, under the rules herein referred to, had constructive notice of all the conditions of the deed, such rules do not go to the extent of establishing an agreement on her part to be personally liable for the payment of incumbrances against the property in the absence of proof of some fact or circumstance from which such agreement on her part can be shown. The evidence shows that by letter she sent a payment of \$1000 on this mortgage. While the letter is not in the record, from the testimony relating thereto it is evident that it was written by defendant in error and the money sent by her personally to apply on this mortgage. It





does not appear that the money came from the rents of the property or from any other source except the personal funds of defendant in error. She contends, however, - and in this she is supported by the Appellate court, - that this is merely an evidence of a desire on her part to free the property of the lien and not evidence of acceptance on her part of the assumption clause of the deed. With this we cannot agree. In the absence of any proof limiting the effect of such payment, we are of the opinion that it must be taken as an act of assent on her part to the assumption clause of the quit-claim deed to her. This payment undoubtedly establishes actual knowledge on her part of the existence of this mortgage. It also negatives any repudiation of the assumption clause in the deed and constitutes evidence of conduct on her part denoting an acceptance of such clause."

Applying these rules to the facts of this case it appears from the uncontradicted proof that the purchase price of this property was \$16,000; that the encumbrances on the property were credited to defendant as a part of the consideration for the same; that he took a deed after it was recorded and took possession of the premises and for several years continued to make payments upon these encumbrances. His conduct speaks much louder than any words and shows conclusively the acceptance by him of the deed with knowledge, as we must presume, of the assumption clause. The conveyance by the grantor was a sufficient consideration for his promise. Dean v. Walker, 107 Ill. 540; Dean v. Enlebach, 129 Ill. 467; Ray v. Williams, 113 Ill. 91; Webster v. Fleming, 175 Ill. 141. The amount due was proved by competent evidence, and there is no error in this record which requires a reversal. The judgment is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.





37244

PAYROFF TINKOFF,  
Appellant,

vs.

GEORGE W. GRIFFITHS,  
Appellee.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

274 I.A. 665<sup>2</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

February 16, 1933, plaintiff, Payroff Tinkoff, an attorney and accountant, sued defendant, George W. Griffiths, in an action of contract in the Municipal court. The statement of claim alleged a balance due on account of services rendered in behalf of a certain estate of which defendant was trustee. The claim was for \$702.85, and the affidavit of Mr. Tinkoff was attached to the statement, in which he averred that this amount was due after allowing all credits. The statement was stricken on motion of defendant, and May 18, 1933, plaintiff filed an amended statement setting up the alleged services in detail and naming George W. Griffiths, trustee, as defendant. An affidavit similar to the former one as to the amount due, etc., was attached to this amended statement.

June 1, 1933, defendant, as trustee, filed an affidavit of merits to this amended statement, in which in substance he denied the making of a contract of employment, such as was alleged in the statement of claim, but averred that it had been agreed that the services of plaintiff should be paid for by the different beneficiaries of the trust, defendant himself being one of these beneficiaries and the property of the trust having been distributed to these respective beneficiaries. The affidavit of merits averred that plaintiff had rendered a bill for defendant's share for these services to defendant in the sum of \$692.43, which defendant paid, and that he was therefore not indebted.

There was a motion for plaintiff to strike the affidavit of merits, which was denied. The cause was set for hearing but continued

BARON T. TIMMONY,  
Respondent,  
vs.  
WILLIAM W. BARRINGER,  
Appellant.

274 I.A. 665

MR. TIMMONY'S EXHIBIT  
EXHIBITS TWO COPIES OF THE COURT.

February 14, 1933, Plaintiff, BARON T. TIMMONY, by attorney  
and accountant, and defendant, WILLIAM W. BARRINGER, in an action of  
assault in the District Court. The plaintiff at that time  
alleges that on account of services rendered in behalf of a certain  
estate of which defendant was trustee. The claim was for \$700.00,  
and the affidavit of Mr. TIMMONY was attached to the complaint. It  
was on August 14th, 1933, that this cause was set for trial at St. Louis.  
The plaintiff was advised on motion of defendant, and May 10, 1933,  
plaintiff filed an amended complaint setting up the alleged services  
in detail and naming George W. Griffith, trustee, as defendant. An  
affidavit attached to the latter one as to the amount due, was  
attached to this amended complaint.

June 1, 1933, defendant, as trustee, filed an affidavit of  
veritas to this amended complaint, in which in substance he stated  
the making of a contract of employment, upon which was alleged in the  
statement of claim, but averred that he had been advised that the ser-  
vices of plaintiff should be paid for by the different beneficiaries  
of the trust, defendant himself being one of these beneficiaries and  
the property of the trust having been distributed to these respective  
beneficiaries. The affidavit of veritas averred that plaintiff had  
rendered a bill for defendant's share for these services to defendant  
in the sum of \$700.00, which defendant paid, and that he was therefore  
not indebted.

There was a motion for plaintiff to strike the affidavit of  
veritas, which was denied. The cause was set for hearing but continued



from time to time, and on July 14th, in the absence of defendant or anyone representing him, the cause was tried before the court. There was a finding for plaintiff in the sum of \$799.85, and judgment entered therefor.

August 19th thereafter defendant moved to vacate the judgment, and August 21st defendant by leave filed his petition with certain affidavits in support of his motion. Plaintiff made a motion to reassign the case to Judge Lyle, who entered the judgment, and his motion was denied as was also a petition for a change of venue from Chief Justice Constepy, which was filed later. The hearing on the motion was continued from time to time. Plaintiff made a motion to strike the petition, which was denied. The manner of the hearing was anomalous, in that while considering the motion to strike, the court at the request of plaintiff also heard oral evidence. At the conclusion of the hearing he entered an order vacating the judgment and setting the cause for trial. From that order plaintiff prosecutes this appeal.

While the hearing and proceedings are in some respects unusual (for which plaintiff was largely responsible), we think the controlling facts are not doubtful. Defendant had filed an affidavit of merits, which if true was a complete defense to plaintiff's claim. The cause had been set for trial, and defendant's attorney had appeared from time to time indicating an intention to defend against the claim. One continuance, at least, was made at the request of plaintiff. The cause had been set for trial in room 902 before Judge Lyle July 14, 1933, which was Friday. Friday and Saturday were the closing days of court preceding the summer recess for cases in which, like this, the amount involved exceeded \$200. Such cases, according to the practice of the court, would be continued automatically to some day in the fall (or during the summer set for some certain day in the fall), and at that time a general

from time to time, and on July 14th, in the absence of defendant or anyone representing him, the cause was called before the court. There was a finding for plaintiff in the sum of \$750.00, and Judge

made certain findings.

August 13th immediately thereafter moved to vacate the

judgment, and August 13th defendant by leave filed his petition

with certain affidavits in support of his motion. Plaintiff made

a motion to reconsider the case in Judge Kyle, who entered the judgment,

and his motion was denied as was also a petition for a

change of venue from Court House No. 1, which was filed later.

The hearing on the motion was continued from time to time. Plaintiff

filed a motion to strike the petition, which was denied. The

motion of the hearing was announced, in that while considering the

motion to strike, the court at the request of plaintiff also heard

oral evidence. At the conclusion of the hearing he entered an order

vacating the judgment and setting the cause for trial. From that

order plaintiff proceeded this appeal.

While the hearing and proceedings are in some respects un-

usual (for which plaintiff was largely responsible), we think the

controlling facts are not doubtful. Defendant had filed an affidavit

in support of his motion to set aside the judgment, which at that time was a complete return to plaintiff's

claim. The cause had been set for trial, and defendant's attorney

had appeared from time to time insisting on intention to defend

against the claim. The continuance, at least, was made at the re-

quest of plaintiff. The cause was set for trial in June 1932

before Judge Kyle July 14, 1932, which was Friday. Friday and

Saturday were the closing days of court preceding the summer recess

for cases in which, like this, the amount involved exceeded \$500.

It is noted, according to the records of the court, would be ap-

pointed automatically to some day in the fall for during the summer

set for some certain day in the fall, and at that time a general

order of the Municipal court advised attorneys to check up the files in August or early in September in order that these dates might be ascertained.

The petition of defendant averred that on different days prior to July 14th, one of defendant's attorneys made inquiry of the clerk and was informed by him that the case would not be tried on the 14th but that he should examine the files in August or early in September to learn upon what day the case would be tried. It also averred that defendant's attorney appeared in court personally July 14th and inquired of the clerk as to the disposition of the cause and was informed that it had been continued until fall. The averment of the petition that defendant had no actual knowledge of the entry of this judgment until the service of an execution on him on August 17, 1938, is not contradicted, although practically at the end of the proceeding leave was given plaintiff to file an answer to the petition.

The clerk of the court testified that he did not have any recollection of talking with defendant's attorneys. The record shows, however, that 51 cases were on Judge Lyle's call at this time and that this one was No. 28. Recollection by the clerk of everything that occurred in connection with these cases on this hot July day would be unusual. In addition to the testimony of the clerk plaintiff himself testified, and his testimony gives a quite vivid picture of what actually occurred. In brief, a clerk from his office took care of the case before Judge Lyle while plaintiff was in the Probate court engaged in a matter there with Mr. Fischer, who had charge of the case for defendant before Judge Lyle. Plaintiff says that he did not know that Mr. Fischer was personally handling the case, but he did know that the firm of Campbell, Clithero & Fischer represented defendant. Plaintiff went from the Probate



order of the Municipal Court advised attorneys to show up the files in August or early in September in order that those dates might be convenient.

The petition of defendant answered that on different days prior to July 14th, one of defendant's attorneys made inquiry of the clerk and was informed by him that the case would not be tried on the 14th but that he should examine the files in August or early in September to learn upon what day the case would be tried. It also averred that defendant's attorney requested in court previously July 14th and inquired of the clerk as to the disposition of the case and was informed that it had been continued until July 14th. The avowment of the petition that defendant had no actual knowledge of the entry of this judgment until the service of an execution on him on August 14, 1935, is not contradicted, although practically at the end of the preceding leave was given plaintiff to file an answer to the petition.

The clerk of the court testified that he did not have any recollection of talking with defendant's attorneys. The record shows, however, that 21 cases were on Judge Kyle's call at this time and that only one was No. 22. Recollection by the clerk of everything that occurred in connection with these cases on this day may well be correct. In addition to the testimony of the clerk plaintiff's counsel testified, and his testimony given a definite picture of what actually occurred. In brief, a check given him at this time took care of the case before Judge Kyle while plaintiff was in the Probate Court engaged in a matter there with Mr. Wicker, who had charge of the case for defendant before Judge Kyle. Plaintiff says that he did not know that Mr. Wicker was personally handling the case, but he did know that the firm of Campbell, Clifton & Wicker represented defendant. Plaintiff went from the Probate

court to the courtroom of Judge Lyle but did not make any effort to inform defendant's attorneys either by 'phone or otherwise. He says that when he appeared before Judge Lyle the case was called and defendant was called; that the Judge asked him (plaintiff) what was the nature of the claim and that he replied it was for accounting fees and the amount was \$702.65; that the Judge asked if there was any interest claimed and he replied there was 5 per cent, and that the Judge directed the judgment be entered for the amount of \$702.65, plus interest; that subsequently upon rechecking the amount, "we noticed that there was an error, and the correct amount should have been \$799 and that was the amount that was finally entered on July 14th."

It does not appear that any witness was sworn, although there was an affidavit of merits on file which denied that anything whatever was due. An examination of Mr. Tinkoff which appears from an additional abstract filed is as follows:

"The Court: Q. Mr. Witness, you knew who the attorneys for the defendant were, did you not?

A. I knew who the attorneys were, yes, sir.

Q. Did you make any effort to reach them by telephone or otherwise?

A. No, sir; because we were busy on the 14th of July; that morning I was busy in a hearing with this counsel, Mr. Fischer, in the Probate court, and we had our -- one of our clerks upstairs to keep the calendar open on this account, and the fact I now remember that the case was set down for some subsequent day and then was set aside.

Q. You mean the 14th? A. Yes.

Q. It was set for some subsequent date? A. Yes."

Cross examination by Mr. Fischer:

"Mr. Fischer: Q. And you said nothing whatever to me that morning about having this case on call or making any motion for an ex parte judgment, did you?

A. I didn't know that you were representing him.

Q. You knew--the firm of Campbell, Clithero & Fischer, of which firm I am a member, were the attorneys for the defendant in this case? A. Yes, sir."

The plaintiff says that the Judge directed that the judgment should be entered for \$702.65, plus interest; that he first computed

court to the contrary of Judge Rice and did not make any effort to  
inquire defendant's attorney either by phone or otherwise. He says  
that when he appeared before Judge Rice the case was called and de-  
fendant was called; that the judge asked him (plaintiff) what was  
the nature of the claim and that he replied it was for accounting  
fee and the amount was \$700.00; that the judge asked if there was  
any interest claimed and he replied there was 8 per cent, and that  
the judge directed the judgment be entered for the amount of  
\$700.00, plus interest; that defendant's attorney was present and  
amount, "we noticed that there was an error, and the correct amount  
should have been \$700 and that was the amount that was finally  
entered on July 14th."

It does not appear that any witness was sworn, although  
there was an affidavit of service on file which stated that nothing  
further was due. An examination of Mr. Tinsell's notes appears from  
an additional abstract filed in as follows:

"The Court: O. W. Wilcox, you know who the attorneys  
for the defendant were, did you not?  
A. I know who the attorneys were, yes, sir.  
Q. Did you make any effort to reach them by telephone  
or otherwise?  
A. No, sir; because we were busy on the 14th of July;  
that morning I was busy in a meeting with this counsel, Mr. Wilcox,  
in the Probate Court, and we had not had a chance to get  
to keep the calendar open on this account, and the fact I now re-  
member that the case was not seen for some subsequent day and then  
was not called.  
Q. You mean the 14th? A. Yes.  
Q. It was not for some subsequent date? A. Yes."

These recollections by Mr. Wilcox:

"Mr. Tinsell: A. And you said earlier abstract to me that  
nothing about matter this case as called my action for an  
abstract judgment, did you?  
A. I think it was you were representing him.  
Q. The next day after at Campbell, Wilcox's witness, if  
called first as a witness, was the attorney for the defendant in  
this case?"

The plaintiff says that the judge directed that the judgment  
should be entered for \$700.00, plus interest; that on this account



this as \$524, and on rechecking noticed that there was an error, and that the amount should have been \$799, and judgment for that amount was finally entered. No witness was sworn in the case. That the whole proceeding amounted to a fraud is apparent from an examination of this record.

A voluminous brief has been filed citing the leading cases on proceedings under section 39 of the Practice Act and bills in equity to set aside judgments. None of them is applicable to a situation like this where sharp practice was indulged in and where the record indicates that the judgment was entered without jurisdiction. Courts have inherent power to protect themselves from this kind of practice and should exercise it without fear or favor. The order entered does not deprive plaintiff of any substantial right. It merely provides that he may present his case and have it determined according to the law of the land - a right of which he was glad to deprive the defendant.

For the reasons indicated the judgment of the trial court is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

this as 1884, and on re-examination noticed that there was an error, and that the amount should have been \$750, and judgment for that amount was finally entered. No witness was sworn in the case. That the whole proceeding amounted to a fraud is apparent from an examination of this record.

A voluminous brief has been filed citing the leading cases on proceedings under section 36 of the Practice act and bills in equity to set aside judgments. None of them is applicable to a situation like this where equity practice was indulged in and where the record indicates that the judgment was entered without participation. Equity must be set aside and the parties restored to their rights of practice and should exercise it without loss or delay. The order entered here and denying validity of any substantial right. It merely provides that he may present his case and have it determined according to the law of the land - a right of which he was glib to deprive the defendant.

For the reasons indicated the judgment of the trial court is affirmed.

Witness my hand and seal this 10th day of May, 1900.

John W. Roberts, Jr., Clerk.

37296

IDA HITCHCOCK BLOOD,  
Appellee,

vs.

THE WM. MEYER COMPANY,  
a Corporation,  
Appellant.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

274 I.A. 665<sup>3</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a decree awarding to complainant an accounting for half of the gross proceeds arising from the sale of a book known as "The Cosmetiste," and re-referring the cause to a master to state the account between the parties.

The cause was heard upon exceptions of defendant to the report of a master in chancery, to whom it had been referred. These exceptions were overruled, and a decree entered in conformity with the recommendations of the master.

The facts as alleged in the bill and found by the master are as follows:

In April, 1925, and for several years prior thereto, complainant was engaged in teaching and demonstrating the art known as "Beauty Culture." Defendant corporation was engaged in the business of manufacturing, demonstrating and selling beauty culture equipment and machinery. William Meyer was the president and manager of the corporation and had full charge of its business. While complainant was engaged in teaching and demonstrating she compiled a set of notes covering the art, which were used by her in teaching and demonstrating. She taught at the Wenzel Way School of Beauty Culture and elsewhere.

In the early part of April, 1926, she had conferences with Meyer, who represented defendant, concerning the compilation and publication of her notes in book form for sale to the general public. On or about April 14, 1926, an oral contract was entered into



THE NEW YORK COMPANY,  
Applicant.  
vs.  
THE NEW YORK COMPANY,  
Appellee.

374 I.A. 665

IN SENATE  
JANUARY 11, 1938

This is an appeal by defendant from a decree granting to plaintiff an accounting for sale of the Green Yachts existing from the sale of a boat known as "The Green Yacht", and restoring the same to a status as if the same had been sold by the plaintiff. The court has heard upon exceptions of defendant to the report of a master in chancery, as when it had been referred. Those exceptions were overruled, and a decree entered in conformity with the recommendations of the master.

The facts as alleged in the bill and found by the master are as follows:

In April, 1935, and for several years prior thereto, defendant was engaged in buying and reselling the art known as "Beauty Yachts". Defendant corporation was engaged in the business of manufacturing, demonstrating and selling Beauty Yachts exclusively and exclusively. William Meyer was the president and manager of the corporation and had full charge of its business. While defendant was engaged in buying and reselling the Beauty Yachts a set of notes covering the art, which were used by her in 1935-1936 and demonstrated. The same at the New York City School of Beauty Yachts and elsewhere.

In the early part of April, 1937, she had conferences with Meyer, who represented defendant, concerning the acquisition and disposition of her boat in New York for the Green Yacht. On or about April 14, 1938, an oral contract was entered into

between the parties whereby it was agreed that complainant would permit defendant to use her notes in and about the compilation and publication of the book; that she would enter the employ of defendant and would teach and demonstrate the art of beauty culture under the direction of Meyer; that she would demonstrate and recommend exclusively the equipment manufactured and sold by defendant and that in consideration of her notes and her services defendant would pay her and she would accept as full compensation half of the gross proceeds arising from the sale of the books, plus a drawing account of \$35 a week and expenses when out of the city of Chicago.

Pursuant to the contract she delivered the notes to Meyer and under his direction wrote a text book known as "The Cosmetiste," which was copyrighted under the name of the defendant. Defendant caused seven editions of the book to be issued, in all approximately 18,000 copies. These were printed and offered for sale and were sold to the public. Complainant has fully performed her part of the contract and has no knowledge as to the exact number of copies or the exact price at which they were sold, or the exact amount received by defendant, as she kept no books of account in relation thereto, but all the facts are within the knowledge of Meyer and defendant kept books of account showing the facts. After the completion and sale of these seven editions of the book complainant from time to time demanded from defendant an accounting and that it pay to her her share of the gross proceeds arising from the sales, but defendant neglected to make such accounting or to pay such money. In September, 1931, complainant left the employ of defendant and Meyer refused to account to her for the proceeds from the sale of the book and told her that the book was in fact the property of defendant.

The answer of defendant set up a number of defenses. Defendant asserts that the finding that the contract was executed is against the preponderance of the evidence and urges that, if made,

between the parties whereby it was agreed that complainant would permit defendant to use her notes in and about the compilation and publication of the book; that she would enter the copy of the manuscript and would teach and demonstrate the art of beauty culture under the direction of Meyer; that she would demonstrate and recommend exclusively the equipment manufactured and sold by defendant and that in consideration of her notes and her services defendant would pay her and she would accept as full compensation half of the gross proceeds arising from the sale of the books, plus a drawing account of \$300 a week and expenses shown out of the city of Chicago.

Defendant as the contract was delivered the notes to Meyer and under his direction wrote a book known as "The Cosmetologist," which was copyrighted under the name of the defendant. Defendant caused seven editions of the book to be issued, in all approximately 12,000 copies. These were printed and offered for sale and were sold to the public. Complainant has fully performed her part of the contract and has no knowledge as to the exact number of copies of the exact price at which they were sold, or the exact amount received by defendant, as she kept no books or account in relation thereto, but all the facts are within the knowledge of Meyer and defendant kept books of account showing the facts. After the completion and sale of these seven editions of the book complainant from time to time demanded from defendant an accounting and that it pay to her her share of the gross proceeds arising from the sales, but defendant neglected to make such accounting or to pay such money. In September, 1931, complainant left the employ of defendant and Meyer talked to account to her for the proceeds from the sale of the book and told her that the book was in fact the property of defendant. The answer of defendant set up a number of defenses. Defendant asserts that the relation that the contract was executed in, and the circumstances of the evidence and argues that, it was,



the agreement was ultra vires the corporation; that Meyer as president was without authority to make such contract, and that no such authority was conferred upon him; that complainant cannot obtain equitable relief because of unclean hands, and that the cause of action is barred by the statute of limitations.

The contention of defendant as to unclean hands is based upon the alleged fact that the material which complainant furnished to defendant was not her own but was taken from other books and authorities.

There are two answers to this contention. In the first place, the rule is applicable only where the inequity of which complaint is made concerns the very matter about which relief is sought. Assuming that the findings of the master and the decree are correct, the supposed inequitable conduct is in our opinion too remote to bar complainant from her action. In the second place, the notes she furnished and the book she assisted in preparing for publication do not purport to be more than a compilation of knowledge on the subject. She made no particular claims to being an original investigator along these lines, but the evidence tends to establish that with the assistance of defendant's president this material gathered from different sources was compiled into a treatise on the subject which was more or less useful, but which at any rate served the evident purpose for which it was designed, that is, advertising (at the expense of the purchasers) machines, equipment, etc., of defendant company. Indeed, it seems to have been a successful venture. Meyer says that complainant quit the service of defendant voluntarily, and that defendant would have been willing to make use of her services for a longer time had she wished to remain. We hold that complainant is not precluded by any inequity in her conduct from maintaining her suit.

Again, defendant contends that the alleged agreement was

the argument was that the commission; that they were not  
 sent was without authority to make such contract, and that no such  
 authority was conferred upon him; that complaint cannot obtain  
 equitable relief because of defense made, and that the cause of ac-  
 tion is barred by the statute of limitations.

The contention of defendant as to defense made is based  
 upon the alleged fact that the material which complaint involved  
 to defendant was not her own but was taken from other books and ma-  
 terials.

There are two answers to this contention. In the first  
 place, the rule is applicable only where the identity of which com-  
 plaint is made concerns the very matter about which relief is sought.  
 Assuming that the findings of the master and the deoies are correct,  
 the supposed inadmissible evidence is in our opinion too remote to bar  
 complaint from her action. In the second place, the notes she  
 furnished and the book she caused to be prepared for publication do  
 not purport to be more than a compilation of knowledge on the subject.  
 She made no particular claim to being an original investigator along

these lines, but the evidence tends to establish that with the  
 assistance of defendant's president this material gathered from lit-  
 erary sources was compiled into a treatise on the subject which was  
 more or less useful, but which at any rate served the public pur-  
 pose for which it was designed, and in, answering (at the ex-

pose of the defendant) defendant, etc., of defendant  
 company. Indeed, it seems to have been a successful venture. If  
 this defendant will the material of defendant voluntarily,  
 and that defendant would have been willing to make use of her con-  
 tains for a longer time had she wished to publish. It held that com-  
 plaint is not precluded by any inequity in her conduct from main-  
 taining her suit.



ultra vires the corporation. The charter was put in evidence and states, "The object for which it is formed is to manufacture electrical, medical and scientific apparatus, instruments and appliances and to engage in buying and selling same." As already stated, this book seems to have been well designed for the promotion of the sale of defendant's machines and apparatus and therefore was (we hold) well within the implied if not the express powers for which the corporation was formed. Defendant cites to this point National Home Bldg. Assoc. v. Home Savings Bank, 181 Ill. 38; Converse v. Emerson Co., 242 Ill. 619; United States Drawing Co. v. Delese & Sheppard Co., 259 Ill. 274; African Home Purchase & Loan Assoc. v. Carroll, 267 Ill. 300. The law on this subject as developed in the jurisdictions of the different states and the federal jurisdiction is not altogether harmonious as will appear from an interesting discussion of the subject in Fletcher Cyclopedia Corporations, present edition, vol. 7, chap. 40. Although some decisions in Illinois follow the rule of the federal jurisdiction that a contract properly ultra vires is void, that doctrine has been much modified. In section 3548 of the work just quoted, the author says:

"Adding to the confusion and conflict in regard to the doctrine of ultra vires, many courts distinguish between (1) transactions wholly outside the scope of the authority of a corporation, and (2) transactions which, under some circumstances, are within the authority of the corporation but, in the particular case, are in excess of the authority of the corporation because of the purpose of the transaction or otherwise. Stated in another way, the classification is (1) acts which are an abuse or an excessive use of powers granted, and (2) acts outside the objects of the corporation and wholly beyond the corporate powers; or (a) abuse of power as distinguished from (b) want of power. In other words, the class of cases now under consideration embrace those where the act is within the powers of the corporation for some purposes but outside the powers of the corporation in the particular case. Different rules are applied, in certain conditions, to the two classes."

In support of this statement the author cites authorities from many other states; those cited from Illinois are Sherrard State Bank v. Vernon, 243 Ill. App. 122; Peoria Life Ins. Co. v. Inter-



with the corporation. The matter was not in evidence and  
evident, "the object for which it is formed is to manufacture elec-  
trical, mechanical and scientific apparatus, instruments and equip-  
ment and to engage in buying and selling same." As already  
stated, this book seems to have been well designed for the prom-  
tion of the sale of defendant's machines and apparatus and therefore  
was (we hold) well within the implied powers of the express powers for  
which the corporation was formed. Defendant asked in this point  
National Home Bldg. Assoc. v. Home Savings Bank, 181 Ill. 58;  
Centers v. Western Co., 242 Ill. 419; United States Trust Co.  
v. Johns & Edwards Co., 239 Ill. 374; AT&T v. American  
Land Assoc. v. United, 237 Ill. 330. The law on this subject as  
developed in the jurisdiction of the Illinois courts and the  
Federal jurisdiction is not altogether harmonious as will appear  
from an interesting discussion of the subject in Wheeler v. Ho-  
lles Corporation, 237 Ill. 330, 331. Wheeler v. Ho-  
lles Corporation in Illinois holds the rule of the Federal judicial  
also that a contract covering right of way is void, right of way  
has been much modified. In section 1345 of the new law books,  
the author says:

"Adding to the confusion and conflict in regard to the doc-  
trine of right of way, some courts divide between (1) public  
lands which include the right of the authority of a corporation,  
and (2) private lands, which are not public. The latter  
the authority of the corporation and, in the latter case, the  
in excess of the authority of the corporation because of the pur-  
pose of the transaction or otherwise. Stated in another way, the  
classification is (1) public lands or public or public or  
of public lands, and (2) private lands or private or private  
right and public lands or public or public or public  
as public lands or public or public or public or public  
of public or public or public or public or public or public  
again the power of the corporation for public or public or public  
the power of the corporation in the particular case. Wheeler  
rule are applied, in which modification, as the law stands.

It appears that right of way is the subject of the following from  
many other states; some cited from Illinois are Wheeler v. Ho-  
lles v. Western, 237 Ill. 330, 331; Wheeler v. Ho-

National Life & Annuity Co., 246 Ill. App. 52. Even if we consider the contract here made as an abuse of the powers granted, it would not be wholly void, and in view of the fact that performance on the part of complainant has been completed, we cannot doubt her right to recover upon it.

In the next place, defendant contends that as the supposed contract is not an ordinary corporate transaction its president had no authority merely by virtue of his office to enter into it, and no authority was conferred upon him. In support of this contention defendant cites C. E. & G. R. Co. v. Coleman, 18 Ill. 298; Bar-chant's National Bank v. Riccobis & Co., 223 Ill. 41; Independent Oil, etc. v. Fort Dearborn, etc., 311 Ill. 278. The general rule in Illinois is that the president of a corporation by virtue of his office is recognized as the business head of the company and any contract executed by him on behalf of the corporation pertaining to corporate affairs and within its general powers will, in the absence of proof to the contrary, be presumed to have been done by authority of the corporation and be binding upon it. Quigley v. Macauley & Co., 321 Ill. 124. We hold that presumptively the president of this company had power to execute the contract in question and that this presumption has not been overcome by other evidence.

The principal contention of defendant is that the burden of proof was upon complainant to make out her case by a preponderance of the evidence; that she has not established it by such preponderance. In the consideration of this question we must consider in the first place the weight which should be given to the report of the master. There has been some confusion in the authorities upon this question and some of the older decisions were to the effect that the finding of a chancellor approving the report of a master was entitled to the same weight in a court of review as the verdict





of a jury. This is not the law. The findings of a master in chancery are only prima facie correct, and where the evidence, as here, was all taken before the master and none before the chancellor and the chancellor did not see or hear the witnesses, this court is not bound to apply the rule that a finding of the chancellor will not be set aside unless it is clearly and manifestly against the weight of the evidence. Oliver v. Ross, 289 Ill. 684. But while this is the rule the finding of the master is prima facie correct and since the master sees and hears the witnesses, that fact also is entitled to proper weight, although not the weight which would be given to a verdict of the jury. This is particularly true in a case like this, where complainant relies upon an oral contract and where the evidence to a great extent consists of statements made by her on the one side which are denied by a witness for defendant on the other, each of the witnesses being unimpeached, each of them having the same opportunity for knowledge and each of them being equally interested in the result of the suit. The contention of defendant is that in such case the burden of proof being upon complainant, a reviewing court must hold as a matter of law that the burden of proof as required of complainant to establish her case has not been met. The cases are rare indeed to which such a rule might be applied. The reasonableness of the testimony of witnesses and the probability of the truthfulness of the narration of events to which they testify, are, with many others, matters which should be taken into consideration and which may in a proper case sway the finding to one side or the other. We have carefully read over the evidence of complainant and that of defendant, and are impressed with the fact that her narration is the more reasonable and probable. A persuasive, if not controlling, fact is that she had prepared this material largely before the beginning of her service with defendant and that defendant appropriated and made use of it and, in fact, in

of a jury. This is not the law. The findings of a master in  
necessity are only prima facie correct, and where the evidence, as  
here, was all taken before the master and none before the jury,  
for and the chancellor did not see or hear the witnesses, this  
court is not bound to apply the rule that a finding of the chan-  
celler will not be set aside unless it is clearly and manifestly  
against the weight of the evidence. Oliver v. Harris, 200 Ill. 404.  
And while this is the rule the finding of the master is prima facie  
correct and since the master saw and heard the witnesses, that  
fact alone is entitled to greater weight, although not the weight  
which would be given to a verdict of the jury. This is particularly  
true in a case like this, where complaint relied upon an oral con-  
fession and where the evidence is a great extent consisted of statements  
made by her on the one side which are denied by a witness for the other.  
And on the other, each of the witnesses being unimpeached, each of  
them having the same opportunity for knowledge and each of them  
being equally interested in the result of the suit. The contention  
at defendant is that in such case the burden of proof being upon  
complainant, a verdict must be set aside as a matter of law. But  
the burden of proof as required of complainant to establish her case  
has not been met. The cases are here indeed to which such a rule  
might be applied. The reasonableness of the testimony of witnesses  
and the probability of the truthfulness of the narration of events  
to which they testify, are, also many others, matters which should  
be taken into consideration and which may in a proper case sway the  
finding to one side or the other. We have carefully read over the  
evidence of complainant and that of defendant, and are impressed with  
the fact that her narration is the more reasonable and probable. A  
persuasive, if not controlling, fact is that she had exposed this  
matter largely before the beginning of her service with defendant  
and that defendant was present and made use of it and, in fact, in

each of the editions acknowledged her authorship on the title page. In this commercial day it is usual for a person to pay for what he receives and unreasonable to suppose that valuable material and services will be given without compensation.

A second consideration which tips the scales in favor of complainant's contention is the inconsistency of parts of the evidence of defendant's president. The following account of the examination of defendant's president will illustrate:

"Q. It is your contention that when you hired her the authorship of the book was to be part of her duty? A. No, sir.

Q. Well, you hired her at \$35 a week; what was she supposed to do? A. First of all, demonstrate apparatus; second, write some instructions for the apparatus showing particularly the mode of application of that apparatus; and third, after I had decided that it would cost more to get out the different bulletins covering these instructions, then to compile it in a book form and she was to write certain articles with which she was familiar and I was to write other articles and also to supervise the work of getting out this compendium."

In addition to this is the undisputed fact appearing from the evidence that at the time complainant entered into the contract with defendant she was then employed by another concern for which she was receiving \$50 a week. It seems hardly possible she would relinquish this to accept an employment in which she would receive only \$35 a week. The former employer was not financially impecunious and some time later quit business, but complainant's undisputed testimony is to the effect that up to the time she quit her salary was paid in full.

Added to these facts is the further one, already mentioned, that the master saw and heard the witnesses, which must be given some weight. After a review of all the record we conclude that we cannot hold the decree to be against the weight of the evidence, and for that reason it is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.





37328

CHICAGO TITLE AND TRUST COMPANY,  
a Corporation,  
Defendant in Error,

vs.

HELEN G. HENLEY and EUGENE H. HENLEY,  
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

274 I.A. 665<sup>4</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

In an action in contract, upon trial by jury, at the close of all the evidence after a motion by defendants for an instructed verdict in their favor had been denied, the court upon motion of plaintiff directed the jury to return a verdict for plaintiff in the sum of \$1176.38. The verdict was returned, and the court overruling motions for a new trial and in arrest, entered judgment in favor of plaintiff for the amount of the verdict. Defendants ask that this judgment be reversed with a finding of fact.

There is practically no conflict in the evidence. Eugene H. Henley is the husband of Helen G. Henley; they were the owners of certain land in Cook county. October 1, 1928, they entered into a contract in writing to sell this land to the Astma Ball Bearing Manufacturing Co.; their agent and broker in that behalf was one A. M. DeVry; in fact Mrs. Henley had shortly before purchased this particular piece of property through DeVry who acted as her broker and agent. October 1, 1928, DeVry, in the presence of Eugene H. Henley and by his direction, signed an application to plaintiff for a guaranty policy in its usual form and in the sum of \$100,000. The application states that the title was vested in Helen G. Heller, "now Helen G. Henley;" that the party to be guaranteed was the Astma Ball Bearing Mfg. Co., a corporation of Illinois. The application was signed, "A. M. DeVry, applicant, address 474 Wrigley Bldg., on behalf of Helen G. Henley, or Helen G. Heller." Mr. Berdhold, attorney for the purchasing corporation, was present at the time Mr.

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In an action in contract, when trial is held, it is the duty of the jury to find the facts and to return a verdict thereon. If the evidence is such that the jury is satisfied that the defendant is liable, they should return a verdict for the plaintiff. If the evidence is such that the jury is satisfied that the plaintiff is liable, they should return a verdict for the defendant. If the evidence is such that the jury is not satisfied that either party is liable, they should return a verdict for neither party.

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To ensure our work was as good as possible, we had to be as good as possible. H.

and the other part, I received. I received the other part of the money.

...and ... ..

1. The above information is being furnished to you for your information only and is not to be used for any other purpose.

[illegible]

THESE TOWERS ARE NOT AS HIGH AS THE OTHERS AND ARE NOT AS WELL KNOWN AS THE OTHERS.

valued at amount to 500,000 and at 100,000, 500,000, 1 to 100,000, 100,000

and by the Government, it was not intended to be a contribution to the Government.

100-3516 To me and all the other boys of the village

100-443887-100

NEW YORK: HENRY HOLT & CO., 15 N. 4TH ST.

... ..

[illegible]

Report of the Secretary of the Navy, 1899, p. 100.



Menley directed DeVry to sign this application. DeVry had a charge account with plaintiff, and the policy was issued and delivered and charged to his account. Monthly bills or statements for services were rendered to him. In these statements were included the charges for the guaranty policy, services, etc., rendered, on account of which plaintiff seeks to recover. Several such bills were mailed to DeVry. Later plaintiff mailed a bill for these services to Eugene M. Menley, and thereafter a bill for the same was sent to Helen G. and Eugene M. Menley. Plaintiff did not carry a charge account with defendants or either of them. The contract between the Menleys and the Manufacturing Co., by which the Menleys agreed to convey this real estate is in evidence. It provides that the vendors agreed to deliver a "guarantee policy of the Chicago Title & Trust Co., in its usual form." It contains no provision by which either an abstract or a certificate of title from the Torrens' office might be substituted. This contract, with a check for \$5,000 to the order of Eugene M. Menley, less \$5 escrow fee, was on the date of the contract deposited in escrow with plaintiff.

There is proof that the policy was delivered to attorney Bordhold, and that the amount for which plaintiff sues is the usual, customary and reasonable charges for the services rendered.

One Hamilton was produced as a witness for the purpose of proving conversations and agreements between Menley and DeVry concerning the terms under which DeVry was employed to sell the real estate. An objection to this evidence was sustained. Defendants then offered to prove by Hamilton that the agreement between DeVry and Menley was that DeVry was to receive as compensation for his services everything over and above \$125,000 obtained from the sale of the property and to pay all expenses of the transaction including the cost of a guaranty policy; further, that plaintiff issued bills to DeVry, which Hamilton saw, and that DeVry regarded the debt as his personal

Healey directed Davy to sign this application. Davy had a charge account with Healey, and the selling was issued and delivered and changed to his account. Monthly bills or statements for services were rendered to him. In these statements were included the charges for the quantity policy, services, etc., rendered, on account of which Healey made a bill for some services to Davy. Later Healey made a bill for the same was sent to Helen G. Healey, and thereafter a bill for the same was sent to Helen G. and Eugene A. Healey. Healey did not carry a charge account with defendants or either of them. The contract between the Healey and the Manufacturing Co., by which the Healey agreed to convey this real estate is in evidence. It provides that the vendors agreed to deliver a "guarantee policy of the Chicago Title & Trust Co., in its usual form." It contains no provision by which either an abstract or a certificate of title from the Healey office might be submitted. This contract, with a check for \$5,000 to the order of Eugene A. Healey, less \$5 account fee, was on the date of the contract submitted in answer with Healey.

There is proof that the policy was delivered to Healey, both of them, and that the money for which Healey made is the usual customary and reasonable charges for the services rendered.

The Healey was produced as a witness for the purpose of showing untruthfulness and collusion between Healey and Davy and to prove the terms under which Davy was employed to sell the real estate. An objection to this evidence was sustained. Defendants then offered to prove by Healey that the agreement between Davy and Healey was that Davy was to receive no compensation for his services excepting over and above \$15,000 obtained from the sale of the property and to pay all expenses of the transaction including the cost of a quantity policy, interest, and Healey listed bills in Davy, which Healey saw, and that Davy regarded the debt as his personal

obligation. This evidence was excluded.

February 9, 1929, plaintiff wrote M. H. Henley in substance that DeVry had ordered the guaranty policy in behalf of Helen G. Henley; that the item was past due and that if it was not paid further action would be taken. Henley replied that the services were charged to DeVry's account; that DeVry had been paid the amount necessary to pay the account. To this letter plaintiff replied that the files showed that the guaranty policy was ordered in behalf of Mrs. Henley and insisted that she remit.

This suit was begun May 4, 1929, against DeVry, Helen G. and Eugene H. Henley. The death of DeVry was suggested June 19, 1929. The case came on for trial December 31, 1929, but a juror was withdrawn and leave was given plaintiff to file an amended statement of claim in ten days. The amended statement of claim was filed December 24, 1929, against only Helen G. and Eugene H. Henley. April 24, 1931, a decision issued from the office of the clerk of the Municipal court to take the depositions of defendants in the City of New York, and their depositions were taken and returned to the court. On the trial plaintiff, over the objection of defendants, read parts of these depositions. At the time the depositions were taken evidence had been offered by defendants concerning the agreements of defendants with DeVry. Plaintiff objected at that time and reserved its objection upon the trial, and its objections were sustained by the trial court. At the conclusion of all the evidence there was an instructed verdict as heretofore stated.

Defendants argue in the first place, that assuming DeVry had authority to bind Helen G. Henley, it was still possible for him to make a contract with plaintiff on his own responsibility, and they cite a number of cases to the effect that the addition to the signature of the word "agent," or similar words, are mere descriptive personae. They cite Mead v. Altgeld, 136 Ill. 298; Chicago Title and



Obligation. This evidence was admitted.

February 2, 1910, Plaintiff wrote to A. Henry in substance:

"That Davy had ordered the University to issue a diploma to him."

"Henry, that the issue was not the same as it was not paid."

"Further action would be taken. Henry replied that the university"

"were charged to Davy's account; that Davy had been told this amount"

"necessity to pay the amount. In this letter Plaintiff replied that"

"the issue would be the university's duty to issue a diploma to"

"Mrs. Henry and advised that she would."

"This was the first time that Plaintiff had written to Henry."

"and advised A. Henry. The date of Davy was suggested to be 1910."

"1910. The same was in the letter Plaintiff to A. Henry, dated 1910."

"was admitted and later was given Plaintiff as this in substance:

"most of claim in the letter. The attached statement of claim was filed"

"December 21, 1910, against only Henry, and against A. Henry, 1910."

"1910, a letter from the office of the City of New York."

"also sent to the the Department of Education in the City of New York."

"and their Department was taken and returned to the office. On"

"the trial Plaintiff, even the objection of Defendant, took notice of"

"these admissions. At the time the admissions were taken Plaintiff"

"had been advised by Defendant concerning the admission of Plaintiff"

"with Davy. Plaintiff objected at that time and removed the objection"

"upon the trial, and the admissions were mentioned by the trial judge."

"At the conclusion of all the evidence there was no remaining matter"

"on Defendant's side."

"Defendant argues in the first place, that according to Davy had"

"admitted to him that A. Henry, it was still possible for him to be"

"with a contract with Plaintiff on his own responsibility, and that"

"this a matter of course to the effect that the admission to the claim"

"one of the words 'agent', or similar words, was not admitted."

Trust Co. v. Delassaux, 336 Ill. 322; Andres v. Carolan, Graham, Hoffman, Inc., 336 Ill. 342, and many other cases. They say that Henleys had no account with plaintiff; that \$5,000 was deposited in escrow; that plaintiff could have retained the price of the guaranty policy, if it wished, and instead of this, it elected to release the funds in its possession and to look to DeVry for payment. They further say that plaintiff could have recovered from DeVry.

We think it quite unnecessary to review the cases cited. They are clearly distinguishable upon the facts and not at all controlling here. The mere fact that the items sued for were charged to DeVry's account would not preclude a suit thereafter against defendants. White Oak Coal Co. v. Worthington, 184 Ill. app. 567. In the absence of proof to the contrary the contract with plaintiff will be interpreted as the application of defendants, not of DeVry, since it clearly appears that DeVry acted in the transaction for disclosed principals. See Restatement of the Law of Agency, sects. 155 and 156. There was no proof here, nor offer to prove, that plaintiff or its agents handling this transaction were informed that DeVry was to pay these costs and expenses. If such knowledge had been brought home to plaintiff, a different question would be presented. The uncontradicted evidence shows that defendants with knowledge requested and accepted the services of plaintiff and the papers and documents produced by such services; that by written contract they had expressly obligated themselves to deliver such documents as prepared by plaintiff. On the plainest principles of equity and justice they are obligated to pay for that which they have received and used. The conversations between defendants and their agent DeVry in the absence of representatives of plaintiff could not in any way be binding upon plaintiff unless there was an offer to show that such conversations or arrangement had been made

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has been now 000.00 said : "I think it is a good one for the day."

and to enter and penetrate even those places that were not

It is wished, and intended to make it a permanent policy.

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NOTE: This column may have slightly more than 2000 characters.

• 71706

1. The above information was obtained from the files of the FBI, New York Office, dated 1/10/68.

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10-10-68

...and the weather is also a pleasant surprise. The weather is just what I need.

Continued on inside back cover

2011年12月1日，中国工商银行股份有限公司（以下简称“工商银行”）与北京银行股份有限公司（以下简称“北京银行”）签订了《战略合作协议》，约定双方在多个领域开展合作。2012年1月1日，工商银行与北京银行签订了《战略合作协议》，约定双方在多个领域开展合作。2012年1月1日，工商银行与北京银行签订了《战略合作协议》，约定双方在多个领域开展合作。

...and the ... ..

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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known to plaintiff prior to or during the time that its services were rendered. Such evidence was self-serving and inadmissible.

It is suggested that the court erred in permitting plaintiff to use the depositions which had theretofore been taken and lodged in the court <sup>by</sup> defendants. No leave was asked by defendants to withdraw these depositions prior to the beginning of the trial, and there is abundant authority to the effect that plaintiff might, if it chose, introduce evidence under these circumstances. Adams v. Russell, 85 Ill. 284; Daggett v. Greene, 254 Ill. 134; McCormick & M. Co. v. Lester, 81 Ill. App. 316; Penn. B. & O. Co. v. Anda Co., 131 Ill. App. 426; Quatus v. Murdock, 154 Ill. App. 270. Indeed, there is authority to the effect that it would have been error for the court to have permitted their withdrawal over the objection of plaintiff. Acme Waste Paper Co. v. W. B. Paper Supply Co., 233 Ill. App. 268. At the same time, the court could sustain proper objections to parts of the depositions which were incompetent, irrelevant and immaterial. Ayer v. Brant, 42 Ill. 78. Where the same issues are involved, depositions taken in a former suit may properly be read in evidence. Boyle v. Wiley, 15 Ill. 576; McConnell v. Smith, 27 Ill. 232; Fraitt v. Keadig, 122 Ill. 293; Miller v. Calumet & I. Co., 121 Ill. App. 56.

Defendants cite a number of cases to the effect that agency cannot be proven by the statements or acts of the agent, and that the burden of proving agency is on the one who alleges it. This is a correct statement of a general rule of law, but this rule does not render inadmissible evidence as to acts performed by an agent in behalf of his principal nor statements made by him under circumstances which would estop the principal from denying the agency. The rule for which defendants contend is inapplicable to a record such as this. Of the numerous cases so holding, we cite only a few. Cadwell v. Meek, 17 Ill. 220; P. C. C. & St. L. Ry. Co. v.

[illegible]

Gage, 286 Ill. 213.

Upon this record, as a matter of law defendants were clearly liable, and the court therefore did not err in directing a verdict for plaintiff. Libby, Macmillan & Libby v. Cook, 222 Ill. 206; Hewles v. Bryan, 254 Ill. 143; Grantz v. Grantz, 314 Ill. 243.

The judgment is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.



1976, 11 May, 1977

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NO. 10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-100

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37336

PAN-AMERICAN WALL PAPER AND  
PAINT CO.,

Appellant,

vs.

DAVIS G. McCARN, RUTH McCARN,  
MITCHELL DAWSON and ELSIE STANSBURY,  
Executrix of the Estate of Ralph W.  
Stansbury, Deceased,  
Appellees.

APPEAL FROM SUPERIOR  
COURT OF COOK COUNTY.

274 I.A. 665<sup>5</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

This appeal is by complainant from a decree which modified a restraining order theretofore issued on complainant's action and dismissed the bill and supplemental bill for want of equity, taxing costs of proceeding against complainant. The cause was heard upon exceptions to the report of the master. Certain evidence was also taken in open court upon the hearing before the chancellor. Defendants' exceptions were in part sustained, and the report of the master was in all other respects confirmed. Complainant filed no objections to the report.

The suit was by way of a creditor's bill filed February 16, 1932, and based on a judgment rendered in favor of complainant and against defendant, Davis G. McCarn, on October 27, 1931, for the sum of \$9569.67 and costs.

The bill averred that there was a balance due on the judgment in the sum of \$5572 and costs of the suit; that at the time the indebtedness was incurred and for years prior thereto Davis G. McCarn was the owner of 200 shares of the Star-Fearless Wall Paper Mills, an Illinois corporation; that in April, 1931, while this indebtedness was owing, McCarn caused this stock to be transferred to defendant Stansbury without consideration; that this transfer was made with the intent to defraud complainant and other creditors, and that complainant was informed and believed that the stock was in the possession of either Stansbury or Ruth McCarn, defendant's

ON TUESDAY

DAVID L. WELCH, 1011 W. 10th St.,  
Wichita, Kan., and DAVID WELCH,  
Executive of the Wichita of 1011 W.  
10th St., Wichita, Kan.

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The bill was passed by the House on the 10th day of March 1897 and it was sent to the Senate on the 11th day of March 1897. The Senate passed the bill on the 12th day of March 1897 and it was signed by the President on the 13th day of March 1897.



wife, and that they held the same in trust for McCarn.

Davis G. McCarn and Ruth McCarn, named as defendants, answered denying the allegations of the bill. Stensbury answered that on April 16, 1931, Davis G. McCarn assigned and delivered to him certificate No. 29 for 333 shares of Class B stock of the Star-Peerless Wall Paper Mills in trust for Ruth McCarn according to the terms of a declaration of trust in writing, which he attached to his answer; that the certificate was transferred on the books of the corporation; that at that time he had no knowledge of any indebtedness due from Davis G. McCarn to complainant. He denied that the transfer was made with fraudulent intention and asserted that it was not a sham as alleged and was not made in trust for McCarn or to prevent a levy on it.

The master reported April 11, 1933, finding the recovery of the judgment, the issuance of an execution, its delivery on November 3, 1931, to the sheriff and the return by the sheriff on February 3, 1932, endorsed that he had sold stock of defendant in complainant company, levied on for \$4000 and paid \$593.72 to solicitor for complainant and returned the execution unsatisfied as to the balance; that there was then due upon the judgment \$3672.67 and costs, together with interest from the date of its rendition.

The master further found that the judgment was entered upon a certain promissory note for \$11,000, dated October 17, 1930, signed by defendant McCarn and payable to the order of complainant on or before October 17, 1935; that the note contained a power to confess judgment and that payments were endorsed thereon to the aggregate amount of \$2000, the last endorsement being for \$1000 on March 31, 1931.

The master also found that simultaneously with the execution of the note, McCarn executed a collateral pledge agreement of the same date, securing the note; that the agreement pledged as col-

wife, and that they held the same in trust for said wife.

David G. McGinn and Ruth McGinn, known as defendants,

answered denying the allegations of the bill. Respondent answered

that on April 10, 1931, David G. McGinn assigned and delivered to

him certificate No. 22 for 222 shares of Class B stock of the

University of California, which he had then assigned

to the terms of a declaration of trust in writing, which he at-

tached to his answer; that the certificate was transferred on the

books of the corporation; that at that time he had no knowledge

of any indebtedness due from David G. McGinn to complainant. He

admitted that the transfer was made with fraudulent intention and

admitted that it was not a bona fide purchase and was not made in

good faith for McGinn or to prevent a levy on it.

The master reported April 11, 1931, finding the facts

of the judgment, the issuance of an execution, its delivery on

February 3, 1931, to the sheriff and the return by the sheriff on

February 3, 1931, endorsing that he had sold stock of defendant in

complaintant's company, listed on for \$4000 and paid \$1000 to said

for the complaintant and returned the execution unsatisfied as to

the balance; that there was then the balance \$3000.00.

and costs, together with interest from the date of its rendition.

The master further found that the judgment was entered upon

a certain promissory note for \$11,000, dated October 17, 1928,

signed by defendant McGinn and payable to the order of complainant

on or before October 17, 1933; that the note contained a power to

convert judgment and that payments were entered thereon to the

aggregate amount of \$2000, the last endorsement being for \$1000 on

March 31, 1931.

The master also found that simultaneously with the execution

of the note, McGinn executed a collateral pledge agreement of the

same date, securing the note; that the agreement yielded an ef-

lateral 100 shares Class B stock of the Pan-American Wall Paper & Paint Co. of Delaware evidenced by certificate No. 19 and authorized complainant to deduct from the salary of McCarn \$200 a month, to apply on the principal sum of the obligation, and also authorized the holder of the note and complainant, upon any default in the payment of interest or in the payment of any of the monthly partial principal payments as stipulated, to sell the stock at any public or private sale without notice and without demanding payment of the note or interest and to apply the proceeds of the sale after deducting all costs and expenses in payment of the note with interest thereon, returning the residue to Davis G. McCarn; further, that in case the proceeds of the sale should fail to cover the amount due upon the note and interest and expenses, McCarn should pay the deficiency.

The master found that the five payments of \$200 each credited on the note were the amounts deducted from the salary of defendant McCarn while he was employed by complainant corporation; that prior to April 1, 1931, Davis G. McCarn was president of complainant corporation and had been associated with it from the time of its incorporation in 1916; that his resignation as president was in the possession of the company for some time, and that it was accepted March 31, 1931, at which time an additional credit of \$1000 was applied to the note; that no further payments were made on the note and the entire unpaid balance was thereafter declared due and the judgment entered; that April 18, 1931, Davis G. McCarn transferred 333 shares of common stock of the Star-Fearless Wall Paper Mills, of which he was the owner, to Stannbury in trust for Ruth McCarn, his wife; that the transfer was made without any consideration and was solely for her benefit; that at that time McCarn had an interest in the home occupied by him in Winnetka, Illinois, which he purchased under contract dated May



During the 1950s, the company was involved in several projects, including the development of the first commercial computer, the UNIVAC, and the development of the first commercial computer, the UNIVAC, and the development of the first commercial computer, the UNIVAC.

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and hereby certify that the foregoing is a true and correct copy of the same as the same appears from the records of the said court.

...and also of the fact that the ...  
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David W. Newman, Chairman, that in case the proceeds of the sale

The master found the two fragments of 1000 each.

1. The following information was obtained from the records of the Federal Bureau of Investigation, Department of Justice, and the Federal Reserve Bank of New York:

the time of its incorporation in 1918; that his resignation as  
of certain corporation was not associated with it from

Amesbury, Mass. 01921, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620,

[illegible]

in great fear with McCann, his wife; that the stenographer was made

What time McGowan had an interest in the home occupied by him in

20, 1930; that he agreed to pay for it the sum of \$16,000, of which \$1000 was paid in cash, he assuming a first mortgage of \$8500; that the balance was payable in monthly installments of \$100 each, of which \$75 was to be applied on account of interest and the balance on the principal; that the agreement was that the title to the property was to be conveyed to McGarn and his wife as joint tenants.

The master found the value of this home as of April 16, 1931, to be \$12,272; that at that time defendants had paid in approximately \$1300 on account of principal and also paid the interest to that date.

The claim of complainant was that the transfer of the 333 shares of stock constituted a fraud upon complainant as a creditor of defendant; that defendant was insolvent on April 16, 1931, and the transfer should therefore be set aside; that defendant claimed he was not insolvent at that time and had sufficient property to pay all his debts and therefore the transfer to his wife was valid.

The master also found the value of defendant's interest in his home on April 16, 1931, was half of \$1320 or \$660; that the stock of defendant in complainant corporation (and pledged as collateral to it) had no market value on that date; that the book value on that date was about \$92 a share, making a total value of \$9200; that defendant had insurance policies which had a cash surrender value of \$2748.95, against which there was a loan of \$1580, leaving a net value of \$2198.95; that he also had \$500, the amount of salary due on March 31, 1931, and \$499.50, which was the amount of the dividend he received from the Star-Pearless Company; that he also had a balance in the bank of \$226.43 which was in his name and that of his wife jointly; that the highest possible value that could be placed on all the assets of Davis G. McGarn on April 16, 1931, was \$12,274.93; that all but \$2374.93 of that sum was the book

30, 1930; that he agreed to pay her in the sum of \$10,000, of which \$1000 was paid in cash, the remaining \$9000 being in monthly installments of \$100 each, of which \$75 was to be applied on account of interest and the balance on the principal; that the agreement was that the title to the property was to be conveyed to her and she was to

LEGAL OPINION

The matter being the value of the same as of April 15, 1931, to be \$10,000; that at that time defendant had paid in approximately \$1000 on account of principal and also paid the interest to that date.

The claim of defendant was that the transfer of the 500 shares of stock constituted a fraud upon complainant as a creditor of defendant; that defendant was insolvent on April 15, 1931, and the transfer should therefore be set aside; that defendant claimed he was not insolvent at that time and had sufficient property to pay all his debts and therefore the transfer to his wife was valid.

The matter also being the value of defendant's interest in the same on April 15, 1931, was that of \$1000 or more; that the stock of defendant in complainant corporation (and pledged as collateral to it) had no market value on that date; that the book value on that date was about \$200 a share, making a total value of \$2000;

that defendant had numerous policies which had a cash surrender value of \$2500.00, policies which there was a loan of \$1000, leaving a net value of \$1500.00; that he also had \$500, the amount of

salary due on March 31, 1931, and \$400.00, which was the amount he of the dividend he received from the steam-ship company; that he also had a balance in the bank of \$1000.45 which was in his name and

that of his wife jointly; that the highest possible value that could be placed on all the assets of David G. Nelson on April 15, 1931, was \$10,000.00; that all but \$2000.00 of that sum was the book



value of the 100 pledged shares of stock of complainant company; that this sum was a great deal more than anyone was willing to pay for the stock, including defendant, who was present at the sheriff's sale and failed to bid more than the amount for which the stock was finally sold by the sheriff.

The master concluded that the transfer by defendant of the 333 shares of stock on April 16th left him in failing financial circumstances; that he was out of employment until the following December and during that time his only source of income was the dividend that might be paid on the Star-Pearless Wall Paper Mills stock; that complainant was defendant's only creditor; that the transfer of this stock to Ruth McCarn resulted in defendant's inability to pay the amount due to complainant and consequently was delaying, hindering and defrauding defendant's creditor and must therefore be regarded as fraudulent and should be set aside.

As already stated, complainant filed no objection to the report of the master.

The decree sustaining exception to the report found that Davis G. McCarn was solvent at the time of the transfer of this stock on April 16, 1931; that the equities of the cause were with defendants, Davis G. McCarn and Ruth McCarn; that the bill of complaint and supplemental bill should be dismissed and the restraining order entered upon the filing of the bill be modified to the end and purpose that the transferees of the stock should be entitled to receive all dividends accrued and declared and thereafter to accrue and be declared on the Star-Pearless stock.

It is the contention of complainant that the transfer of the 333 shares of Class B Star-Pearless stock on April 16, 1931, was fraudulent as against the creditors of Davis G. McCarn because he did not retain sufficient property to provide for the payment of his then existing indebtedness.

The testimony taken before the master shows that Davis G.

value of the low priced shares of stock of defendant company; and this was a great deal more than anyone was willing to pay for the stock, including defendant, and was present at the market's sale and failed to bid more than the amount for which the stock was finally sold to the market.

The master concluded that the transfer by defendant of the 333 shares of stock on April 16, 1923, was a falling financial statement; that he was not at all ignorant of the following statement and during that time his only source of income was the dividend that might be paid on the Star-Boatman Bill Paper Mills stock; that defendant was defendant's only creditor; that the transfer of this stock to Star-Boatman resulted in defendant's inability to pay the amount due to defendant and consequently was delaying, hindering and frustrating defendant's creditor and must therefore be regarded as fraudulent and void as to said.

As already stated, complainant filed no objection to the report of the master.

The master's reasoning exception to the report found that David L. Johnson was solvent at the time of the transfer of this stock on April 16, 1923, that the majority of the cases with which complainant, David L. Johnson was solvent; that the bill of complaint and supplemental bill should be dismissed and the restraining order entered upon the filing of the bill be modified to the end and purpose that the transfer of the stock should be nullified to receive all dividends accrued and to be paid and distributed to receive and be located on the Star-Boatman stock.

It is the contention of complainant that the transfer of the 333 shares of David L. Johnson's stock on April 16, 1923, was fraudulent as against the creditors of David L. Johnson because he did not retain sufficient property to provide for the payment of his then existing indebtedness.

The testimony taken before the master shows that David L.



McCarn had been associated with complainant company since its incorporation in 1916. From that time to April 1, 1931, he was its president. However, his resignation from that office had been in possession of the company for some time and was accepted by it March 31, 1931. The promissory note upon which judgment was entered was for \$11,000, executed October 17, 1930, payable to the order of complainant and by its terms would not fall due until October 17, 1935. The note drew interest at the rate of 5% per annum from date and contained the power to confess judgment "in term time or vacation, at any time hereafter without process." Judgment was entered by virtue of this clause on October 29, 1931, nearly four years prior to the maturity of the note. At the time of the execution of the note McCarn also executed and delivered a collateral agreement in and by which he transferred certificate No. 19 for 100 shares of the complainant company stock. This collateral agreement authorized and directed complainant to deduct from his salary while in its employ the sum of \$200 a month on the 15th day of each month thereafter and apply same on the note. The collateral agreement also provided that if there was any default in the payment of any of the monthly partial principal payments as stipulated, the note should at the option of the holder become immediately due and payable and complainant or its agent might thereafter sell the property or any part of it at public or private sale without notice or discount and without demanding payment of the note or interest and apply the proceeds after deducting costs and expenses to the payment of note and interest, and that if the proceeds were not sufficient to pay the amount due on the note, defendant promised to make up the deficiency. Complainant was expressly given the right to purchase in case of sale. After leaving the employ of complainant March 31, 1931, McCarn did not secure other employment until in December of that year. After the recovery of judgment, complainant did not undertake to sell the stock under the power of sale contained



McGraw had been associated with defendant company since its in-  
 corporation in 1916. From that time to April 1, 1931, he was its  
 president. However, his resignation from that office had been in  
 possession of the company for some time and was accepted by it  
 March 31, 1931. The promissory note upon which judgment was en-  
 tered was for \$11,000, executed October 17, 1928, payable to the  
 order of complainant and by its terms would not fall due until  
 October 17, 1932. The note bore interest at the rate of 6% per  
 annum from date and contained the power to convert judgment "in  
 form time or vacation, at any time hereafter without process."  
 Judgment was entered by virtue of this clause on October 20, 1931.  
 Nearly four years prior to the maturity of the note. At the time  
 of the execution of the note McGraw also executed and delivered a  
 collateral agreement in and by which he transferred ownership in  
 10 for 100 shares of the defendant company stock. This collateral  
 agreement authorized and directed complainant to deduct from his  
 salary while in its employ the sum of \$200 a month on the 15th  
 day of each month thereafter and apply same on the note. The col-  
 lateral agreement also provided that if there was any default in  
 the payment of any of the monthly partial payments as  
 stipulated, the note should at the option of the holder become im-  
 mediately due and payable and complainant or its agent might there-  
 after sell the property or any part of it at public or private sale  
 without notice at the time and without awaiting payment of the note  
 or interest and apply the proceeds after deducting costs and expenses  
 to the payment of note and interest, and that if the proceeds were  
 not sufficient to pay the amount due on the note, defendant promised  
 to make up the deficiency. Complainant was expressly given the right  
 to purchase in case of sale. After having the employ of complainant  
 later 31, 1931, McGraw did not secure other employment until in the  
 month of that year. After the execution of judgment, complainant  
 did not undertake to sell the stock under the power of sale contained

in the collateral agreement but caused an execution to be issued and levied on this certificate of stock in complainant company. Davis W. McCarn was present at the sale December 1, 1931, and the stock was purchased by Peter J. Klapperich, then a stockholder and afterwards elected a director of complainant.

The master found that the value of these 100 shares on April 16th, 1931, was \$93 a share. Complainant having filed no objection before the master nor exception before the chancellor to this finding, is therefore precluded from arguing to the contrary here. Marble v. Thomas, 178 Ill. 340; George v. George, 190 Ill. 166; Barney v. Court, of Lincoln Park, 203 Ill. 397. Assuming this to be the value of the stock on that date, the proof before the master shows that defendant retained an amount of property on April 16th sufficient to meet his obligation, and that practically the entire amount of property so retained was in the possession of complainant.

The bill as filed seems to be based upon the theory that it was the intention of the judgment debtor to defraud complainant by the transfer in trust. The case here, however, is argued upon a different theory, namely, that of a constructive trust, and it is urged that it is not necessary to show actual insolvency in order to render a voluntary transfer to a wife or child void, but that the true test is whether or not the transfer directly tended to or did impair the rights of existing creditors. Complainant cites Birney v. Solomon, 348 Ill. 410, in which the Illinois cases are reviewed. It is there held that the established rule in this State does not require proof of actual insolvency in order to render a voluntary conveyance void where the same is made from a husband to a wife or from a parent to a child. The court said:

"The doctrine is firmly declared to be that one must be just before he is generous. What may be in the mind of the grantor when he makes a voluntary conveyance to his wife or child is immaterial,

in the collateral agreement but caused an execution to be issued and levied on this certificate of stock in complaint company. David W. Adams was present at the sale December 1, 1931, and the stock was purchased by Peter J. Knapowski, then a stockholder and afterwards elected a director of complainant.

The master found that the value of these 100 shares on April 1931, 1932, was \$25 a share. Complainant having filed no objection before the master her execution before the chancellor to this finding, is therefore precluded from raising in her complaint.

But, Smith v. Jones, 175 Ill. 540; Smith v. Jones, 180 Ill. 104; Smith v. Jones, 185 Ill. 107. Assuming this to be the value of the stock on that date, the price before the master shows that defendant retained an amount of property in each sufficient to meet his obligation, and that practically the entire amount of property so retained was in the possession of complainant.

The bill as filed seems to be based upon the theory that it was the intention of the defendant before he retained complainant by the transfer in trust. The case here, however, is argued upon a different theory, namely, that of a constructive trust, and it is urged that it is not necessary to show actual larceny in order to render a voluntary transfer to a wife or child void, but that the issue is whether or not the transfer directly benefited to or did impact the rights of existing creditors. Complainant relies

Smith v. Jones, 185 Ill. 107, in which the Illinois cases are reviewed. It is there held that the established rule in this State does not require proof of actual larceny in order to render a voluntary conveyance void where the same is made from a husband to a wife or from a father to a child. (The court said:

"The doctrine is firmly established to be that one must be just before he is fraudulent. That may be in the mind of the master, but to make a voluntary conveyance to his wife or child is fraudulent,



for if it results in hindering, delaying or defrauding creditors, it must be regarded as fraudulent. A donor may make a conveyance with the most upright intentions, and yet, if the transfer hinders, delays or defrauds his creditors it may be set aside as fraudulent. (Marmon v. Harwood, 124 Ill. 104; McLey v. McLeod, 298 Id. 566.) Of such force is this rule that where one is found to be insolvent after having made a voluntary conveyance to his wife the burden of dispelling the implication of fraud as against pre-existing creditors is upon his grantee. (Millman v. Sadalhofer, 162 Ill. 625; Meritz v. Hoffman, 38 Id. 553; Patterson v. Moloney, supra."

Defendants do not question this rule of law but argue that the facts which appear in this case bring it within an exception to the general rule, namely, that a creditor who is fully secured at the time of a voluntary conveyance may not have the same set aside upon the technical presumption raised merely by establishing the fact of a debtor's indebtedness, but that in such case the creditor should be required to plead and prove other circumstances from which the debtor's intent to defraud might be reasonably inferred. Defendants say that the proof shows that at the date of the transfer complainant was fully secured by the stock of the Pan-American Wall Paper & Paint Co., which had a book value of \$92 a share and which the master has found actually had that value; that this finding is supported by statements in evidence reflecting the financial condition of complainant; that it appears that the stock of complainant is closely held; that it is a "close corporation"; that the financial statements in evidence indicate no inflation of values; that there are no such inflated items as "good will" or "patents" appearing in the balance sheet; that complainant has done business over the comparatively long period of sixteen years, and that it is apparent that except for the subnormal and distressed market for securities of all kinds complainant would have readily realized its indebtedness from an orderly sale of the shares of stock; that as a matter of equity complainant corporation should have set off the value of its shares of stock against defendant McGern's indebtedness, and that if the corporation itself had purchased the stock instead of permitting one of its principal





stockholders to do so, it would have been in the strange position of acquiring for its treasury shares having a book value of \$92 a share, while still insisting on collecting a deficiency. Defendants point out that McCarn had no other creditors than complainant; that he was not in fact in default under his contract but that that default was created through the exercise on the part of complainant of its right of forfeiture which has resulted in a hardship to him; that complainant followed its legal rights strictly, confessed judgment upon the note, proceeded to levy upon the security, and defendants say that while this course was legally permissible it was not calculated to procure the best price for the shares of stock because it emphasized and gave notoriety to the forced character of the liquidation. The original contract between the parties did not contemplate the full repayment of this loan until October, 1935. They further point out that the parties had in contemplation that the repayment would be made out of the salaried earnings of defendant; that repayment was for the time being stopped by the acceptance of defendant's resignation and his temporary unemployment.

A consideration of all the facts seems to justify the conclusion that complainant was taking advantage of all its legal rights and in particular of its legal right to declare the debt due and to enforce a forfeiture at a time when the result was an oppression of defendant. These strict legal rights are not questioned, but a court of equity is slow under such circumstances to <sup>its</sup> give/help to those who thus insist upon purely legal rights which will bring a result of that kind. A forfeiture is always regarded by a court of equity with great abhorrence.

Defendants contend that under two circumstances the undoubted general rule as to transfers of this kind is not applicable; that one of these is where the facts as shown by the evidence are



established to do so, it would have been in the wrong position  
 of negotiating for its treasury shares having a book value of  
 \$25 a share, while still insisting on collecting a deficiency.  
 Deland's point out that Deland had no other creditors than com-  
 mercial; that he was not in fact in default under his contract  
 but that that default was created through the exercise on the part  
 of complainant of its right of forfeiture which has resulted in a  
 hardship to him; that complainant followed the legal rights  
 strictly, and that Deland's point out that while this course was legally  
 permissible it was not calculated to procure the best price for the  
 shares of stock because it was necessitated and gave materially to the  
 latest character of the transaction. The original contract between  
 the parties did not contemplate the full payment of this loan  
 until October, 1915. That contract point out that the parties had  
 in contemplation that the payment would be made out of the earnings  
 earnings of Deland; that payment was for the time being accepted  
 by the acceptance of Deland's resignation and his temporary ap-  
 pointment.  
 A consideration of all the facts seems to justify the con-  
 sideration that complainant was taking advantage of all its legal  
 rights and in particular of its legal right to demand the full  
 due and to enforce a forfeiture at a time when the result was an  
 oppression of Deland. These strict legal rights are not ques-  
 tioned, but a court of equity is also bound to give consideration to  
 the facts to show that there is such an abuse of legal rights which  
 will make a decree of that kind. A forfeiture is always enforced  
 by a court of equity with great reluctance.  
 Deland's contentions that under two circumstances the un-  
 doubted General rule as to forfeiture of this kind is not applicable;  
 that one of these is where the facts as shown by the evidence are

that the complaining creditor has become such creditor subsequent to the time of the transfer, and the other where an existing creditor is fully secured at the time of the transfer.

The exceptions are discussed by Chancellor Kent in an exhaustive opinion filed in Seade, Administr. v. Livingston, 3 Johnson's Chancery Reports (N.Y. 1818) 481. The opinion in that case reviews the English and American authorities and, while stating the general rule which has been followed in Illinois (and holding in that particular case that the transfer in trust was fraudulent as against the creditors) pointed out that as to claims of subsequent creditors there was more difficulty in arriving at a definitive opinion. That great Judge also stated by way of dictum the better opinion to be "that the presumption of fraud as to these creditors arising from the circumstance, that the party was indebted at the time, is repelled by the fact of these debts being secured by mortgage, or by a provision in the settlement; that if no such circumstance exists, they are entitled to impeach the settlement by a bill properly adapted to their purpose, and charging and proving indebtedness at the time, so that their rights will not depend on the mere pleasure of the prior creditors, whether they will or will not impeach the settlement."

As defendants point out, thus early in the history of the law the fact that a creditor was fully secured was recognized as a circumstance that would rebut the presumption of fraud which would otherwise arise from a voluntary conveyance by a debtor, and this dictum of Chancellor Kent seems to have been followed in many cases in different jurisdictions. Without undertaking to discuss the facts in detail, we quote from Home Life & Accident Co. v. Schietl, 173 Ark., 31, where the court said that the reason for indulging presumptions did not apply under circumstances where the creditor held full security, and further said:

that the continuing creditor has become such creditor subsequent

to the time of the transfer, and the other where an existing

creditor is first secured at the time of the transfer.

The exceptions are discussed by the majority in an ex-

haustive opinion filed in 1927, *United States v. American*, 100 U.S. 100.

It is true that the majority in *United States v. American* (1927) said:

"The United States and American creditors are not, within meaning of the statute,

this which has been followed in *United States v. American* (1927) and in the sub-

sequent cases that the transfer in trust was fraudulent as against

the creditors) pointed out that as to claims of subordinated creditors

there was more difficulty in arriving at a definitive opinion. That

great judge also stated by way of dictum his better opinion to be

"that the presumption of fraud as to these creditors arising from

the circumstances, that the party was indebted at the time, is re-

jected by the fact of these debts being secured by mortgage, or by a

provision in the settlement; that if no such circumstance exists,

they are entitled to regard the settlement by a bill properly

assigned to their purpose, and changing and giving satisfaction as

the time, so that their rights will not depend on the mere absence

of the prior creditors, whether they will or will not regard the

settlement."

As defendant points out, then early in the history of the law

the fact that a creditor was fully secured was recognized as a dis-

countenance that would prevent the presumption of fraud from arising

otherwise arising from a voluntary conveyance by a debtor, and this

dictum of Chancellor Kent seems to have been followed in many

cases in different jurisdictions. It is not surprising to observe

the same in *United States v. American*, 100 U.S. 100, where the court said:

"*United States v. American*, 100 U.S. 100, where the court said:

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"In *United States v. American*, 100 U.S. 100, where the court said:



"The reason for this distinction in putting secured creditors in the same category as subsequent creditors is that, whatever presumption is to be indulged, the creditor, in selecting his security, has, unlike a general creditor, disregarded other property of the debtor and looked only to his security for the collection of his debt, hence he is entitled to no presumption of fraud in the conveyance of other property. Such a creditor is one who has already been given a preference over others, and is not in the attitude of an existing general creditor, hence his reliance is deemed to have been founded on his security rather than on the solvency of the debtor."

In Van Wyck v. Seward, 6 Paige's Chancery Reports 62 (N.Y.) affirmed in 18 Wend. 379, a bill brought to set aside an alleged fraudulent conveyance was dismissed. Chancellor Walworth, discussing the facts, said that it appeared that complainant had failed to show that defendant had an intention to defraud complainant by his voluntary settlement of his property which had taken place before it was ascertained that the judgment could not be collected out of the property upon which it was a lien. He said:

"And I think the evidence shows, most conclusively, that the property upon which the assigned judgment was a lien, if sold for anything like its fair cash value, would have been sufficient to satisfy the whole amount of that judgment. The complainant, perhaps, had the technical right to put up the property for sale upon the execution, and bid it in for a nominal sum if no bidder attended to run it up to its fair value, and then to hold William Seward, who had guaranteed the collection of the judgment, liable for the deficiency. But must we presume that William Seward anticipated that such a course of proceeding would have been adopted by the complainant; and hold his settlement of his property among the different members of his family who had claims upon his bounty, fraudulent for that reason? If there was ample property bound by the lien of the judgment to pay the debt, at the fair cash value, and the guarantor had no reason to believe he would be charged with any thing under his guaranty, that is sufficient to rebut all presumption of fraud. Under the circumstances of this case, I do not believe the complainant would have permitted a stranger to bid in the property bound by the assigned judgment at the amount due thereon; leaving his own subsequent judgment unpaid. The assignor, therefore, could not reasonably have anticipated the events which afterwards occurred."

The same rule seems to have been followed in McMillan v.

McMillan, 245 Pac. Rep. 98 (Idaho 1926), where the court said:

"Whatever the general rule may be with respect to the burden of proof in actions to set aside conveyances alleged to be in fraud of creditors, it must be kept in mind that this action is by a secured creditor, one who held mortgage security for the payment of





his debt. The transfer in no manner endangered the mortgage security. The creditor neither alleged nor proved that the mortgaged property was not of sufficient value to pay the debt when the installment payments for the purchase of the land were made and the gift was made to respondent. In such a case, to make it necessary for the grantee to prove that the donor was solvent when the transfer was made, we are of the opinion that it is not sufficient for a secured creditor to merely prove the transfer, the debt, and the subsequent foreclosure and deficiency judgment. Neither a gift from a man to his wife, nor a conveyance to another without consideration, is *prima facie* fraudulent. C. S. sec. 5435."

In Polk County National Bank v. Scott, 132 Fed. Rep. 897, the court said:

"If the only debt the grantor owes at the time of the gift is fully secured, the conveyance must be held valid, for he is then in the same condition legally as if he were free from debt. The evidence shows that at the time Scott made the deed to his wife the debt to the bank was well secured. It appears that the bank rested satisfied with the security for more than eight years. It is not even now shown affirmatively that the property is the hands of the trustees is not sufficient to secure the debt."

In Steckel v. Millien, 210 Ia. 1139, 231 N. W. 387, the Supreme court of that state said in substance that the debtor was entitled in equity to have the security held by the creditor applied on the indebtedness; that if it had been so applied there could be no deficit and without such deficit the creditor was not prejudiced nor damaged by the alleged intended fraud of the debtor who made the conveyance. In Stephenson v. Pasahue, 46 Ohio St. Rep. 184, the same rule was applied.

In National City Bank v. Lowdin, 343 Ill. 430, a subsequent creditor sought to set aside a conveyance made by the debtor to his wife prior to the time the indebtedness originated. The trial court held the conveyance void on the ground that the debtor was heavily indebted when he made the conveyance; but our Supreme court reversed the judgment on the authority of Meritz v. Hoffman, 35 Ill. 533, saying that while the evidence showed that the debtor had considerable indebtedness at the time he made the conveyance, it was largely contingent as security for others, and while the trial court had found that his assets were insufficient to discharge or satisfy his debts and liabilities, nevertheless the evidence failed to support the





court's findings in that respect; that it was arrived at only by charging the debtor in full for all direct and contingent liabilities, a very large portion of which was more than covered by a first-class collateral security, and that as to other portions on which he had a contingent liability as surety, the principal and other sureties were financially sound.

The evidence in this case shows the master found (and complainant may not in the absence of objection argue against the finding of the master) that at the time this conveyance was made the creditor held in its hands ample security to meet the entire indebtedness. This indebtedness became due only by reason of complainant's election to declare it due. For a court of equity to render its assistance to complainant under these circumstances would be to aid in measures oppressive in their nature. On this record it must be held that at the time the transfer was made complainant held in its possession security and property sufficient in value to cover the indebtedness of defendant to complainant, and such an uncontradicted fact rebuts any presumption of fraud on the part of defendant at the time he conveyed the stock in question for the benefit of his wife. It is urged that the court erred in hearing evidence in addition to that reported by the master. Egan v. Egan, 244 Ill. App. 497, and Central Illinois Public Service Co. v. Sullivan, 294 Ill. 101, are cited. We have disregarded this evidence. We presume the chancellor also disregarded it, since the record indicates the evidence was taken only for the purpose of determining whether there should be a re-reference to the master, and after hearing it the chancellor stated in substance that it was not material.

The decree of the Superior court will be affirmed.

DECREE AFFIRMED.

O'Connor and McSurely, JJ., concur.





37345

CHARLES E. GIBSON,  
Appellant,  
vs.  
A. HOLINGER & CO. et al.,  
Appellees.

94  
APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

274 I.A. 666<sup>1</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

This is an appeal by complainant from a decree which dissolved a temporary injunction theretofore issued and dismissed his bill of complaint for want of equity. The cause was heard upon exceptions to the report of a master. The exceptions were overruled, the injunction dissolved and the bill dismissed as recommended by the report.

The bill in substance alleged that complainant and his wife were owners of premises described, which were subject to a trust deed given to one Iwert, an officer of A. Holinger & Co., to secure an issue of bonds in the sum of \$112,000, which were negotiated and sold through Holinger & Co.; that complainant and his wife executed another trust deed conveying the premises to the Chicago Title and Trust Co. to secure additional indebtedness, and a third trust deed to the Phillip State Bank & Trust Co. to secure further and other indebtedness; that the last two described trust deeds were foreclosed in a proceeding in which the decree found the sum of \$25,608.90 was due with interest from December 2, 1931; that Holinger & Co. purchased the certificate of sale for \$2,000, and that this purchase was made by Holinger & Co. as agent and attorney for complainant and his wife to maintain their possession of the premises as provided in an agreement described as Exhibit I; that the master's certificate of sale was assigned to Alexander J. Auer and Paul J. Schlundt, agents and employees of Holinger & Co.; that March 10, 1933, Holinger & Co. advised complainant that it would assign the certificate of

WILLIAM E. GIBSON,  
Assistant,

W. E.

A. MILLER & CO., of St. L.  
St. Louis,

274 I. A. 666

THE NATIONAL BUREAU OF INVESTIGATION  
WASHINGTON, D. C.

This is an appeal by complainant from a report which dis-  
closed a temporary injunction was issued and dissolved his  
bill of complaint for want of equity. The same was heard upon  
complaint to the report of a master. The exceptions were over-  
ruled, the injunction dissolved and the bill dismissed as pre-  
sented by the report.

The bill in instant alleged that complainant and his wife  
were owners of premises described, which were subject to a trust  
made given to one Trust, an officer of A. Hollinger & Co., in return  
an amount of bonds in the sum of \$112,000, which were negotiated and  
sent through Hollinger & Co. to the complainant and his wife received  
another trust deed involving the proceeds of the bonds \$112,000  
Trust Co. to secure additional collateral, and a third trust deed  
of the same \$112,000 made a trust Co. to secure further and other  
instruments; that the said two described trust deeds were fraudulent  
in a proceeding in which the master found the sum of \$112,000 was  
the value interest from December 1, 1911; that Hollinger & Co. pur-  
chased the certificates of sale for \$2,000, and that this purchase  
was made by Hollinger & Co. on behalf and account of the complainant  
and his wife to maintain their possession of the premises as provided  
in an agreement described as Exhibit I; that the master's certifi-  
cate of sale was assigned to Alexander J. East and Paul J. Hollinger  
agents and employees of Hollinger & Co.; that March 11, 1913, Hollinger  
& Co. advised complainant that it would assign the certificates of

sale upon repayment of the \$2,000 and other moneys advanced; that complainant renewed his former promise to pay to Holinger & Co., but was unable to do so, and that the master's deed issued to Eser and Schlundt April 21, 1931; that Eser and Schlundt demanded possession of complainant's flat in said premises and notified the tenants not to pay further rents to complainant. The bill prayed for an accounting and that the deed should be construed to be a mortgage.

Defendants answered the bill, admitting the former ownership of complainant and his wife, the execution of the subsequent trust deeds, the execution of the assignment of rents which was attached to the bill, the foreclosure of the trust deeds and the issuance of the certificate of sale and its assignment to Eser and Schlundt, but denied that the assignment was then in effect or that A. Holinger & Co. acted as agent of complainant. On the contrary, defendants said that they took action in the matter and bought this certificate for the benefit of the holders of the first mortgage bonds in furtherance of plans underway to reorganize the property. Defendants admit they offered to assign the certificate to complainant on different conditions as to payments which complainant never in fact made. They set up in the answer a letter in which the offer was made, but upon which complainant never acted. They admit that the deed finally issued and that the holders of the deed demanded possession of the premises and notified the occupants not to pay the rents. Defendants deny that they ever acted as the agents of complainant and say that they hold the master's deed adversely to complainant. They also deny that complainant was entitled to an accounting.

The evidence taken by the master was largely submitted by stipulation, and there is practically no dispute as to the controlling facts. Indeed, complainant does not argue that any particular finding of fact by the master is manifestly against the evidence, and the findings of the master are prima facie correct. He found



also upon receipt of the \$2,000 and other money advanced; that complaint renewed his former promise to pay to Hollinger & Co., but was unable to do so, and that the master's bond issued to them and defendant's bond to him, both of which were returned to the plaintiff's attorney and notified the plaintiff's attorney that the bill should be continued to be a mortgage.

Defendant answered the bill, admitting the former promise of complaint and his wife, the execution of the subsequent trust deeds, the execution of the assignment of rents which was attached to the bill, the payment of the trust deeds and the issuance of the certificate of sale and its assignment to them and Hollinger & Co. He stated that the assignment was then in effect of that A. Hollinger & Co. acted as agent of complaint, on the contrary, defendant said that they took action in the matter and having this certificate for the benefit of the holder of the first mortgage bond in preference of any other in preference to the plaintiff, defendant said that he acted as agent with complaint, with in fact said. That he acted up in the matter a letter in which the other was made, but which complaint never acted. They said that the deed finally issued and that the holder of the deed executed possession of the premises and notified the defendant not to pay the note. Defendant says that they ever acted as the agent of complaint and says that they said the master's bond should be continued, that the bill should be continued was notified to be an acknowledgment.

The evidence taken by the master was largely admitted by defendant, and there is practically no dispute as to the control of the bill. Indeed, defendant has not argued that any testimony tending to favor the master is inadmissible against the plaintiff, and the holding of the master was also made correct. It is said

that complainant and wife held title to the property August 4, 1931, and found the execution of the first, second and third mortgages as averred; that August 4, 1931, being in default, complainant executed an assignment of the rents accruing from the premises and authorized A. Holinger & Co. to collect the rents and to use the same to pay the costs and disbursements of operating the premises and apply the balance upon interest, taxes and principal on the first mortgage; that August 6, 1931, A. Holinger & Co. appointed complainant its agent to collect the rents and to account for the same every month; that suit was brought to foreclose the second and third mortgages; that complainant and his wife appeared and contested the sale, and a decree of sale was entered December 26, 1931, finding the sum of \$25,093.25 due to Englehart & Krogman, the mortgagees; that the interest of all other parties to that suit were subordinate; that a sale was held January 20, 1932, and the premises sold to Englehart & Krogman for \$25,000, the sale approved, a deficiency decree entered, and a master's certificate of sale issued to the purchasers on or about January 20, 1932; that A. Holinger & Co. was the house of issue of the first mortgage bond issue and on August 4, 1931, was developing plans for the purpose of protecting the first mortgage bondholders; that approximately one year after the certificate of sale had been issued Holinger & Co. advised complainant of the expiration of the redemption period and advised him to purchase the certificate; that complainant advised Holinger & Co. that it was impossible for him to do so, because he had no money with which to effect such a purchase or redemption; that thereafter the bondholders of the first mortgage trust deed considered the matter and reached an agreement with A. Holinger & Co. to purchase the certificate at a discount for their benefit, for the purpose of avoiding another foreclosure; that pursuant to that plan Holinger & Co., through its employees Seer and Schlundt, in January, 1933, purchased the certificate for \$2,000; that the sole purpose of

and there was execution of the first, second and third mortgages as  
witnessed by the same witnesses, and the same witnesses were  
in attendance at the time the premises and contents thereof  
were sold to A. H. H. Co. to collect the rents and so on the same day the  
first and second mortgages of the premises and contents thereof  
were upon interest, taxes and principal on the first mortgage; that  
August 6, 1931, A. H. H. Co., appointed complainant its agent to  
collect the rents and so on account for the same every month; that said  
was brought to foreclosure the second and third mortgages; that com-  
plainant and his wife appeared and contested the sale, and a decree  
of sale was entered December 27, 1931, vesting the sum of \$20,000.00  
to the H. H. & W. Co., the respondents; that the interest of all  
other parties to those mortgages were subordinate; that a sale was held  
January 20, 1932, and the proceeds paid to H. H. & W. Co. for the  
\$20,000.00, the full amount, a certain sum being withheld, and a receipt  
certified to the fact that the respondents are at about January 2,  
1932; that A. H. H. Co. was the holder of issue at the first  
mortgage bond issue and on August 1, 1931, was developing plans for  
the purpose of protecting the first mortgage bondholders; that ap-  
proximately one year after the certificate of sale had been issued  
H. H. & W. Co. advised complainant of the expiration of the redemption  
period and advised him to purchase the certificate; that complainant  
advised H. H. & W. Co. that it was impossible for him to do so, be-  
cause he had no money with which to effect such a purchase or redem-  
ption; that thereafter the bondholders of the first mortgage trust deed  
considered the matter and reached an agreement with A. H. H. Co.  
to purchase the certificate of a discount for their benefit, for the  
purpose of avoiding another foreclosure; that payment to that plan  
H. H. & W. Co., through its employees Green and Behrman, in January,  
1932, returned the certificate for \$2,000; that the sole purpose of



the purchase was to prevent another foreclosure.

The master further found that the proof did not show that A. Holinger & Co. acted as agent or attorney for complainant; that the purchase was made to terminate the rights and interests of complainant and other parties, excepting the first mortgage bondholders; that an account had been rendered and the accounting showed that no part of the \$2,000 used in the purchase was obtained from the rents of the premises; that Holinger & Co. did not owe any money to complainant; that, on the contrary, complainant is indebted to Holinger & Co. for a large sum of money; that complainant was not entitled to an accounting, and that the bill of complaint was defective and should be dismissed because complainant did not offer to do equity by the return of any sum of money advanced by Holinger & Co.; that the evidence did not show that the master's deed was to be held as a mortgage; that the rents collected pending the injunction should be turned over to defendants, Esler and Schlundt.

As already stated, it is not argued that any fact found by the master is contrary to the evidence. Further, it is quite difficult to understand the theory upon which complainant proceeds. He cites cases, many of which are not discussed, to the points that the relationship of principal and agent existed between complainant and defendants; that a fiduciary relationship was created by the acts of the parties at the time of the acquisition of the assignments of rents by A. Holinger & Co.; that the burden was upon the assignee to show that no fiduciary relationship existed and that it had completely performed its obligation, and that a fiduciary relation may exist in all cases in which influence has been acquired and abused, or in which confidence has been reposed and betrayed; and, finally, cites an authority to the point that where a transaction is originally intended to be a mortgage, it will continue so until legally otherwise determined. Bearss v. Ford, 103 Ill. 16. This last proposition, of

the purpose was to prevent another interference.  
The master further found that the price did not show that  
A. Hollinger & Co. acted as agent or attorney for complainant; that  
the purchase was made to terminate the rights and interests of com-  
plainant and their parties, consisting and their parties (Hollinger &  
that an account had been rendered and the accounting showed that no  
part of the \$2,000 paid in the purchase was obtained from the rents  
of the premises; that Hollinger & Co. did not owe any money to com-  
plainant; that, on the contrary, complainant is indebted to Hollinger  
& Co. for a large sum of money; that complainant was not entitled to  
an accounting, and that the bill of complaint was defective and  
should be dismissed because complainant did not offer to do equity  
by the return of any sum of money advanced by Hollinger & Co.; that  
the evidence did not show that the master's deed was to be held as a  
mortgage; that the rents collected pending the litigation should be  
turned over to complainant, West and Linnell.  
As already stated, it is not argued that any fact found by  
the master is contrary to the evidence. Therefore, it is only neces-  
sary to restate the many facts which complainant presented. In  
other cases, many of which are not disclosed, so the purpose that the  
relationship of principal and agent existed between complainant and  
Hollinger; that a fiduciary relationship was created by the sale of  
the premises at the time of the negotiation of the assignment of rents  
by A. Hollinger & Co.; that the burden was upon the assignee to show  
that a fiduciary relationship existed and that it had completely  
terminated the obligation, and that a fiduciary relation may exist in  
all cases in which an assignor has been assigned and assigned, or in which  
an assignee has been released and destroyed; and, finally, cited an au-  
thority to the point that where a relationship is existing in such  
as to be a mortgage, it will continue so until legally otherwise for  
terminal. Estate of West, 108 Ill. 10. This last proposition, of

course, is not as a matter of law in dispute. The difficulty is that there is not a scintilla of evidence in the record from which a court could find that the transaction at the time of the purchase of the master's deed was ever intended by anyone to be a mortgage. Defendants complain that complainant in his argument has not followed the rules of this court, and we are of the opinion that the complaint is not without reason. Many cases are cited, but only a few of them are analyzed or shown to have any possible application to the facts appearing here. Such presentation only adds to the burdens of the court.

As defendants point out, A. Holinger & Co. was not (as complainant assumes it was) the agent in the transaction in question. On the contrary, it was the agent of the bondholders whose bonds were secured by the first mortgage. When default was made in payments under that mortgage, A. Holinger & Co. sought and obtained from complainant as additional security an assignment of the rents of the property. A day or two thereafter it employed complainant to collect the rents for it, agreeing to pay him compensation of three per cent and permit him to occupy an apartment in the premises. It is now apparently contended that the effect of this was to create the relationship of principal and agent as between A. Holinger & Co. and complainant. If it could be said that such relationship was thereby created, it would seem clear that Holinger & Co. would be the principal, since it hired and paid complainant to act in its behalf in making collections. Upon this theory, we would have the anomalous situation of the agent claiming that it was the duty of the principal to act for the agent's benefit, which, of course, would be absurd. As a matter of fact and of law, of course, A. Holinger & Co. was obligated to look after the interests of the first mortgage bondholders. In Re Danville Hotel Co., 38 Fed. (2nd) 10; Frazier v. Rome Telephone & Telegraph Co., 91 Wash. 253. In securing the assignments of rents Holinger & Co. acted in the



... is not as a matter of law in evidence. The difficulty is that there is not a sufficient evidence in the record from which a court could find that the transaction at the time of the purchase of the master's land was ever intended by anyone to be a mortgage. The defendant complains that counsel in his argument has not followed the rules of this court, and as one of the reasons that the complaint is not without reason. Many cases are cited, but only a few of them are analyzed or shown to have any possible application to the facts presented here. Such presentation only adds to the confusion of the court.

As defendant's agent, A. Hollinger & Co. was not in compliance with the law in the transaction in question. On the contrary, it was the agent of the bondholders whose bonds were secured by the first mortgage. When defendant was made in payments under that mortgage, A. Hollinger & Co. bought and obtained from bondholders an additional security in assignment of the rents of the property. A day or two thereafter it employed counsel to collect the rents for it, refusing to pay any compensation of their own rent and causing him to occupy an apartment in the premises. It is now abundantly clear

that the attempt of this was to create the relationship of principal and agent between A. Hollinger & Co. and bondholders. If it could be said that such relationship was thereby created, it would seem clear that Hollinger & Co. would be the principal, since it lived and paid complaints to act in its behalf in making collections. Upon this theory, we would have the anomalous situation of the agent claiming that it was the principal to act for the agent's benefit, which, of course, would be absurd. As a matter of fact and of law, of course, A. Hollinger & Co. was obligated to look after the interests of the first mortgage bondholders. In the Hollinger v. Bondholders case, 101 Cal. 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200.

In the Hollinger v. Bondholders case, 101 Cal. 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200.

way of fulfilling its obligation to the bondholders to whom it had sold the securities; and it can hardly be said that when it arranged to have complainant collect the rents that it, as agent for complainant, hired complainant to act as its agent.

Other authorities cited by complainant proceed upon the theory that a fiduciary relationship existed between Holinger & Co. and complainant. There is no doubt that such relationship exists in all cases where influence has been acquired and abused or where confidence has been reposed and betrayed. But here, again, there is not a scintilla of evidence in the record tending to establish such fiduciary relationship; on the contrary, the record quite conclusively shows that complainant did not repose confidence in or rely upon Holinger & Co. in these transactions. When he gave the assignment of the rents he was made the agent as part of the consideration to collect the rents with the provision that he should receive compensation for collecting them. He kept monthly accounts of the transactions, and he deducted his commissions before delivering the money to Holinger & Co. to be applied on the debts. In all the transactions this complainant manifested considerable ability in the way of looking out for his own interests. He was intelligent and he was experienced. The cases all hold that something more than the above state of facts is required to create a fiduciary relationship. Cleland v. Fish, 43 Ill. 233; Roche v. Roche, 284 Ill. 336; Higgins v. Chicago Title and Trust Co., 312 Ill. 11; Catherwood v. Morris, 345 Ill. 617. There are no facts in this record which will justify the theory of a fiduciary relationship in any way.

But even if it could be assumed that such relationship existed, the evidence, in our opinion, would rebut any presumption of fraud. There is nothing here that shows any concealment. The uncontradicted fact is that defendant A. Holinger & Co. gave to complainant the opportunity to purchase the certificate; that it strong

way of violating the obligation to the beneficiaries as when it had  
sold the securities; and it can hardly be said that when it attempted  
to have complaint set aside the facts that it, as agent for complain-  
ant, filed complaint to set aside the same.

Other authorities cited by complainant proceed upon the  
theory that a fiduciary relationship existed between Hollinger & Co.  
and complainant. There is no doubt that such relationship existed  
in all cases where advances had been supplied and returned on shares  
consigned has been received and returned. But here, again, there is  
not a scintilla of evidence in the record tending to establish such  
fiduciary relationship; on the contrary, the record tends conclusively  
to show that complainant did not regard Hollinger as an agent upon  
Hollinger & Co. in these transactions. When he gave the assignment  
of the note he was made the agent as part of the consideration in  
collect the note with the provision that he should receive compensation  
for collecting them. He kept monthly accounts of the transac-  
tions, and he deducted his commissions before delivering the money to  
Hollinger & Co. so he acted on the debt. In all the transactions  
this complainant manifested considerable ability in the way of look-  
ing out for his own interests. He was independent and he was ex-  
perienced. The record all tends to show that something more than the above  
state of facts is required to create a fiduciary relationship.

Hollinger & Co. vs. The City of New York, 100 N.Y. 111; Hollinger & Co. vs. The City of New York, 100 N.Y. 111; Hollinger & Co. vs. The City of New York, 100 N.Y. 111. There are no facts in this record which will justify  
the theory of a fiduciary relationship in any way.  
But even if it could be assumed that such relationship ex-  
isted, the evidence, in our opinion, would rebut any presumption of  
fraud. There is nothing here that shows any concealment. The un-  
contested fact is that Hollinger & Co. gave to com-  
plainant the opportunity to purchase the securities; that it was



advised him to purchase it and took no action in the direction of purchasing the same until complainant had refused to make the purchase. Even if it were assumed that Holinger & Co. was the agent of complainant, Holinger & Co. would have been perfectly justified in purchasing the certificate after complainant refused to do so. Spar Mountain Mining Co. v. Schwerin, 308 Ill. 309. The mere existence of a confidential relationship does not make every transaction inso facto void without regard to the actual facts of the cases. Ulrich v. Munke, 61 Ill. 499; Laclede Bank v. Leeler, 109 Ill. 385; Neagle v. McMullen, 334 Ill. 181. Here, complainant was fully advised of every fact material to his interests. There was no concealment; there was no fraud, and complainant had full knowledge of the entire transaction. Even where the relationship was much closer than any which could be said to exist here under similar facts, the courts have held transactions untainted. Kess v. Voss, 52 Ill. 472; Griffin v. Marine Co., 52 Ill. 130; Roberts v. Fleming, 53 Ill. 196; Turner v. Littlefield, 142 Ill. 630.

The purchase of an outstanding title by a mortgagee in possession where the mortgagor has had the opportunity to buy and declined to do so, will not justify a court of equity in imposing a trust in favor of the mortgagor on the property purchased. Griffin v. Marine Co., 52 Ill. 130.

There is no merit on this record in complainant's case. Indeed, the bill is defective in that it fails anywhere in the pleadings to assert that complainant ever offered to repay \$2,000 paid for the certificates, or to repay any sum whatever to defendants. On the contrary, complainant himself testifies that it would be impossible for him to raise the money. Complainant argues that the certificate must have been purchased on his behalf, because he says, it was without value to the bondholders. No one who has



had experience in transactions involving real estate can regard this argument seriously. It is perfectly apparent that Delinger & Co. could serve its clients in no better way.

The decree is just and will be affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.





37393

WHITE SERVICE STATION, INC.,  
a Corporation,

Appelles,

vs.

WILLIAM P. McCUBBIN, doing business  
as Wisconsin Terminal & Warehouse Co.  
and Wisconsin Warehouse & Truck Terminal,  
Appellant.

95-1  
APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

274 I.A. 666<sup>2</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

This appeal is by defendant from a judgment in the sum of \$256.16 entered upon the finding of the court. The action was in contract and was begun by attachment which issued out of the Municipal court September 5, 1933. The affidavit alleged that defendant was indebted in the sum of \$553.27 on open account for gas, oil and other merchandise sold and delivered. The ground for attachment was the non-residence of defendant.

The statement of claim was filed September 14, 1933, and in substance avers that plaintiff was an Illinois corporation; that about May 1, 1931, defendant was engaged in the hauling, trucking and expressing business operating under the name of Madison-Chicago Motor Express company; that May 27, 1931, the business conducted by defendant was incorporated under the laws of the state of Wisconsin under the name of Madison Chicago Motor Express, Inc.; that this name was changed July 21, 1931, to Madison Chicago Warehouse & Freight Co.; that neither of these corporations had ever complied with the provisions of the act to regulate the admission of foreign corporations for profit to do business in the state of Illinois; that from May 1, 1931, up to May 27, 1931, defendant McCubbin purchased from plaintiff certain gas, oils and other merchandise; that from May 27, 1931, up to September 12, 1931, defendant was an officer, agent and director of these Wisconsin companies; and that from May 1 to May 27, 1931, plaintiff sold and delivered to defendant

WILLIAM T. MCDONNELL, INC.,  
a corporation,  
Plaintiff,

vs.

WILLIAM T. MCDONNELL, Inc.,  
as Wisconsin Terminal & Warehouse Co.  
and Wisconsin Terminal & Truck Terminal,  
Defendants.

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF WISCONSIN

274 I.A. 666

This appeal is by defendant from a judgment in the sum of \$286.16 entered upon the finding of the court. The action was in contract and was begun by attachment which issued out of the United States District Court September 8, 1933. The plaintiff alleged that defendant was indebted in the sum of \$286.37 on open account for gas, oil and other merchandise sold and delivered. The ground for attachment was the non-residence of defendant.

The statement of claim was filed September 12, 1933, and in substance avers that plaintiff was an Illinois corporation; that about May 1, 1931, defendant was engaged in the handling, forwarding and express business operating under the name of Madison-Chicago Motor Express company; that May 27, 1931, the business conducted by defendant was incorporated under the laws of the state of Wisconsin under the name of Madison Chicago Motor Express, Inc.; that this name was changed July 27, 1931, to Madison Chicago Warehouse & Freight Co.; that neither of these corporations had ever complied with the provisions of the act to regulate the admission of foreign corporations for profit to do business in the state of Illinois;

that from May 1, 1931, to May 27, 1931, defendant was engaged in the business of handling, forwarding and express business; that from May 27, 1931, up to September 12, 1931, defendant was an officer, agent and director of Madison Wisconsin corporation; and that from May 1 to May 27, 1931, plaintiff sold and delivered to defendant



at his request gas, oil and other merchandise; that also from May 27th up to and including September 1st, 1931, plaintiff sold and delivered to defendant in the name of these corporations gas, oil and other merchandise, which was used in the hauling, trucking and expressing operations; that there was then due plaintiff from defendant \$395.67, which defendant had refused to pay.

The affidavit of merits averred the incorporation of the Wisconsin corporations at the times named; that defendant was a director and stockholder of the Madison Chicago Warehouse & Freight Co., which was organized to carry on a business of interstate hauling, trucking and expressing; denied that he purchased any gas, oil or other merchandise from plaintiff between May 1, 1931, and May 27, 1931, or at any other time.

The affidavit further averred that the Wisconsin corporation assumed an indebtedness of \$169, which was owing to plaintiff by the Madison Chicago Motor Express, whose assets and business were taken over by the Madison Chicago Warehouse & Freight Co., and that from May 27, 1931, to September 1, 1931, a period when defendant was director of the corporation, the Warehouse company paid cash for all the gas, oil and merchandise purchased by it from plaintiff and also a certain amount on the old account assumed by it; that there was no unpaid indebtedness owing to plaintiff incurred by the corporation while defendant was director and stockholder; that he was not on May 1st, or at any other time, engaged in the business of hauling, trucking and expressing, and operating said business as Madison Chicago Motor Express; that in the early part of September, 1931, he sold and assigned his stock in the Warehouse company, resigned as director and informed plaintiff of the fact; that about November 20, 1931, the Warehouse corporation ceased doing business and its assets were taken over by Baemeish, Sabe & McFarland, doing business as Madison Motor Express,

of his report that, all and every newspaper; that also from May  
1937 up to and including September 17, 1937, plaintiff sold and  
delivered to defendant in the name of these corporations gas, oil  
and other merchandise, which was used in the hauling, trucking and  
merchandising operations; that there was then no liability from the  
defendant \$285.87, which defendant had refused to pay.  
The affidavit of notice stated the incorporation of the  
Wisconsin corporations at the times named; that defendant was a  
director and stockholder of the Madison Chicago Warehouse & Freight  
Co., which was organized to carry on a business of warehouse, haul-  
ing, trucking and merchandising; denied that he purchased any gas,  
oil or other merchandise from plaintiff between May 1, 1937, and  
May 27, 1937, or at any other time.  
The affidavit further stated that the Wisconsin corpora-  
tion assumed an indebtedness of \$100, which was owing to plaintiff  
by the Madison Chicago Motor Express, whose assets and business  
were taken over by the Madison Chicago Warehouse & Freight Co.,  
and that from May 27, 1937, to September 1, 1937, a period when  
defendant was director of the corporation, the Wisconsin company  
paid cash for all the gas, oil and merchandise purchased by it  
from plaintiff and also a certain amount on the old account ac-  
counted by it; that there was no unpaid indebtedness owing to plain-  
tiff arising from the merchandise which defendant was director and  
merchandiser; that he was not on May 1st, or at any other time, em-  
ployed in the business of hauling, trucking and merchandising, and  
merchandising sold business as Madison Chicago Motor Express; that in  
the month of September, 1937, he was and assumed his position  
in the Wisconsin company, resigning as director and merchandiser  
May 27, 1937, and after September 17, 1937, the Wisconsin cor-  
poration would have liquidated and its assets were taken over by  
merchandising, said corporation, said business as Madison Motor Express.

which entered into an agreement with plaintiff whereby it agreed to pay \$10 a week on the indebtedness to plaintiff, and that it thereafter made such payments.

The court heard the evidence and made a finding and entered judgment as heretofore set forth. Defendant argues but one point for reversal, namely, that the motion for a new trial should have been granted. In substance, the contention is that the finding of the court is against the manifest weight of the evidence. Since the trial was by the court, the finding of the court is entitled upon review to the same weight as the verdict of a jury.

As to many of the facts, however, there is practically no conflict in the evidence. Prior to the alleged transactions between plaintiff and defendant, one Herling conducted a trucking business under the name of Madison Chicago Motor Express. On May 9, 1931, he sold this business, as he says, to defendant McCubbin but, as McCubbin says, to the Madison Chicago Motor Express Co., Inc., whose name was later changed to Madison Chicago Warehouse & Freight Co. As a matter of fact, the Madison Chicago Motor Express Co. was not incorporated under the laws of Wisconsin until May 27, 1931. The negotiations for the transfer of Herling's business were conducted by defendant McCubbin. The evidence indicates that at that time there was a balance due for oil, etc., from Herling's company to plaintiff to the amount of \$87.55. There is evidence to the effect that defendant at the time the agreement for transfer was made agreed to pay this balance. McCubbin denies, however, that he assumed any personal liability, but the evidence tends to show that plaintiff continued to furnish oil, etc., to the trucks which the corporation took over when it was finally incorporated. A supposed copy of the agreement which is in evidence indicates that the corporation to be organized was to assume and pay this prior indebtedness. Apparently, it was not included in the



which entered into an agreement with plaintiff whereby it agreed to pay him a week on the license for plaintiff, and that it

thereafter made such payment.

The court heard the evidence and made a finding and entered judgment as hereinbefore set forth. Defendant appeals and now asks for reversal, namely, that the motion for a new trial should have been granted. In substance, the contention is that the finding of the court is against the material facts of the evidence. Since the trial was by the court, the finding of the court is entitled to much weight as the verdict of a jury.

As to many of the facts, however, there is practically no conflict in the evidence. Even as the alleged transaction between plaintiff and defendant, one having conducted a trucking business under the name of Madison Chicago Motor Highway, Inc. May 2, 1934, he sold this business, as he says, to defendant. Defendant, an individual, to the Madison Chicago Motor Highway Co., Inc., whose name was later changed to Madison Chicago Motor Co., Inc. as a result of which, the Madison Chicago Motor Highway Co. was not incorporated under the laws of Wisconsin until May 27, 1934. The negotiations for the transfer of defendant's business were conducted by defendant's attorney. The evidence indicates that at that time there was a balance due for oil, etc., from defendant's company to plaintiff to the amount of \$27.83. There is evidence to the effect that defendant at the time the agreement for transfer was made agreed to pay this balance. Defendant denies, however, that he assumed any personal liability, but the evidence tends to show that plaintiff continued to furnish oil, etc., to the truck when the corporation soon after was formed. It is further stated. A supposed copy of the agreement which is in evidence indicates that the corporation to be organized was to assume and pay this prior indebtedness. Apparently, it was not included in the

amount found by the court to be due from defendant. The evidence indicates, however, that the trucks continued to do business, and that from the time they passed out of the control of Herling on May 2nd up to May 27th, plaintiff furnished gas and oil to an amount of the value for which the judgment was entered.

Several witnesses testified for plaintiff that defendant agreed to pay for this oil and gas. Defendant's theory seems to be that the Wisconsin corporation alone was liable. At that time, however, it did not have a legal existence, and defendant in conducting negotiations in its behalf seems to have been in the position of an agent who buys without representing an actual principal. It is not reasonable to suppose that plaintiff would furnish gas and oil without some arrangement as to who should pay for it. The original slips made at the time of the sale and delivery of the different items were offered in evidence but have not been preserved in the bill of exceptions. We would suppose it necessary to presume that these exhibits, if preserved, would have justified the finding of the court. Moreover, a letter of plaintiff dated July 28, 1931, addressed to the Madison Chicago Motor Express at Madison, Wisconsin, is in evidence with a personal reply of the defendant Larson, which, we think, tends to corroborate the testimony of several witnesses produced by plaintiff to the effect that defendant was to be personally liable.

The trial Judge apparently gave careful attention to the testimony. He saw and heard the witnesses, and we are satisfied that substantial justice in the matter has been attained.

For these reasons the judgment of the trial court is affirmed.

**AFFIRMED.**

O'Connor and McMurely, JJ., concur.

amount found by the court in the two statements. The evidence indicated, however, that the funds continued to be retained, and that from the time they passed out of the control of Harding on May 2nd up to May 27th, Alvin Karpis furnished gas and oil to an amount of the value for which the judgment was entered.

The evidence further indicated that Alvin Karpis had agreed to pay for this oil and gas. Defendant's theory seems to be that the witness testimony that was given at that time, however, it did not show a large statement, but testimony in fact stating negotiations in the vicinity of the hotel in the city. View of an agent who says without representing an actual witness. It is not reasonable to suppose that Alvin Karpis would furnish gas and oil without some arrangement as to who should pay for it. The only fact which came at the time of the sale and delivery of the different items were offered in evidence and have not been preserved in the bill of exceptions. We would suppose it necessary to preserve that issue, if possible, would have testified the truth of the court. Moreover, a letter of Alvin Karpis dated July 22, 1934, addressed to the National Chicago Labor Bureau at Madison, Wisconsin, is in evidence with a personal copy of the defendant's letter, which we think, tends to corroborate the testimony of several witnesses produced by Alvin Karpis in the effect that defendant was to be given.

The other large question has already arisen in the testimony. We now ask about the witness, and we are satisfied that substantial justice in the matter has been obtained. For these reasons the judgment of the trial court is affirmed.



37309

JAMES E. CLOW & SONS, a Corporation,  
Appellant,

vs.

230 NORTH MICHIGAN AVENUE BUILDING  
CORPORATION et al.,  
Appellees.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

274 I.A. 666<sup>3</sup>

MR. JUSTICE MASURELY DELIVERED THE OPINION OF THE COURT.

Complainant filed its bill seeking a mechanic's lien on the premises at 230 North Michigan Avenue, Chicago, for a balance of \$13,668.58, representing plumbing material installed in the building. The cause was referred to a master in chancery who, after hearing evidence, reported, recommending a decree in accordance with the prayer of the complainant's bill; upon hearing exceptions to the report the chancellor allowed complainant a lien for \$1219.23, with interest, and disallowed the balance of the claim. Complainant appeals to this court, asking that it be allowed the full amount. Defendants do not question the lien for the smaller amount.

Apparently the chancellor was of the opinion that there was a variance between certain allegations of complainant's bill and the proof, and also that complainant had two contracts for plumbing and that the bill was not filed until after four months from the last delivery under the first contract, hence too late under the statute - Mechanic's Lien Statute, chap. 82, para. 7, (Gasil) which requires the bill to be filed within four months after last delivery. Complainant contends that it had only one contract and that the bill was filed within four months from the date of last delivery, thereby complying with the statute.

The master found that on January 1, 1927, the owners of the fee of the premises in question made a 99 year lease to Henry O. Paschen, which lease on May 15, 1928, was assigned by Paschen to the 230 North Michigan Avenue Building Corporation; that subsequently

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274 I.A. 688

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certain trust deeds conveying the premises were made which are not material to the present controversy. In May, 1928, Henry Paschen, doing business as Paschen Brothers, entered into a written contract as general contractors with the 230 North Michigan Avenue Building Corporation for the construction of an office building on the premises.

August 22, 1928, Paschen made a written contract with John Degnan, Inc., whereby the latter for \$108,000 was to provide all materials and perform all work for the plumbing to be installed in the building.

Complainant is a corporation in the business of manufacturing and selling pipe, plumbing fixtures and supplies. In May and July, 1928, complainant sent to John Degnan, Inc., written quotations of prices on items of plumbing, and John Degnan, Inc., bought some "roughing in" material, said to be pipes enclosed in the structure of a building, not the ordinary plumbing fixtures such as water closets and lavatories. Apparently this "roughing in" material has been paid for, and the present claim for lien is for fixtures.

December 11, 1928, John Degnan, Inc., in writing ordered from complainant certain fixtures for the lump sum of \$15,000, with the understanding that any additions or deductions should be made at the prices of the items contained in the quotations. Subsequently, certain other orders for fixtures and supplies were given to complainant. These goods were furnished by complainant and incorporated in the building.

In May, 1929, there was due complainant for such fixtures, after allowing credits, \$12,449.35; about this time John Degnan, Inc., became financially embarrassed and was not able to pay the bills of complainant and it refused to deliver any more material or fixtures, whereupon Paschen Brothers, the general contractors, wrote a letter to complainant guaranteeing to pay for the remainder



certain trust funds conveying the premises were made with the  
not material to the present controversy. In May, 1932, shortly  
thereafter, being business as between the parties, entered into a writ-  
ten contract as follows: "The parties to this contract are the  
Avenue Building Corporation for the construction of an office  
building on the premises.  
August 22, 1932, between the parties a written contract with  
John Rogers, Inc., whereby the latter for \$100,000 was to provide  
all materials and perform all work for the building to be in-  
stalled in the building.  
Complaint is a corporation in the business of manufac-  
turing and selling glass, window frames and supplies. In May and  
June, 1932, complaint sent to John Rogers, Inc., written ques-  
tions of prices on items of plumbing, and John Rogers, Inc.,  
sent back "roughing in" material, with the prices enclosed in  
the structure of a building, not the ordinary plumbing fixture  
such as water closets and lavatories. Apparently this "roughing  
in" material has been paid for, and the present claim for item is  
the balance.  
December 21, 1932, John Rogers, Inc., in writing advised  
that complaint certain fixtures for the sum of \$10,000, with  
the understanding that any additional or additional work should be made  
at the price of the items included in the quotation. When  
specifically, certain other items for fixtures and supplies were given  
in complaint. These goods were furnished by complaint and in-  
corporated in the building.  
In May, 1933, there was due complaint for cash fixtures,  
after allowing credits, \$10,000.00; amount due John Rogers,  
Inc., because fixtures originally ordered and was not able to pay the  
bill at complaint and it refused to deliver any more material  
at fixtures, and when fixtures, the present controversy,  
was a letter to complaint requesting to pay for the remainder

of the work. The letter says: "We guarantee payment for plumbing material needed throughout the remainder of the work that is ordered from you by our representative at the instigation of John Degan or his authorized representative." The letter also instructed that the orders should be billed "to Paschen Brothers, c/o John Degan." Thereafter complainant delivered plumbing supplies as ordered by Paschen Brothers at the prices agreed upon between complainant and John Degan, Inc. The material delivered after this letter was written amounts to \$1221.45, and the lien for this is not questioned.

The master found that all the plumbing material was wrought into and became a permanent part of the structure, enhancing its value in excess of the amount claimed by complainant. The master also found that the last delivery of material, prior to the letter of Paschen Brothers guaranteeing the account, was in May, 1929, and the last material delivered after that letter was on August 2, 1929; that due notice of the mechanic's liens were served, and that all the parties interested knowingly permitted complainant to furnish materials and supplies to the building; the master found that all of the material allegations of the bill and amendments and supplements thereto had been proven, and recommended a decree accordingly.

Defendants argue that there was a material variance between complainant's pleadings and the proof, in that complainant alleged the contract was made December 11, 1928, while the proof showed it was made May 11, 1928.

We do not regard the point as important. The evidence amply shows that the contract was made December 11, 1928. In equity practice the rule concerning variance is not strictly enforced and cannot be invoked against a decree where the proof is sufficient to support a claim for relief, although the bill may





be incorrect or mistaken in some of its details. Street v. Thompson, 131 Ill. App. 546; Beaver v. Slanker, 94 Ill. 175; McGorhead v. Eggmann, 190 Ill. App. 578. "Equity<sup>always</sup> looks to the real substance of matters put in evidence, and will disregard mere technical objections that do not affect the merits of the controversy." Holman v. Gill, 107 Ill. 467.

Apparently the chancellor was of the opinion that the contracts were made May 11, 1928, or July 9, 1928. The letters written on these days by complainant to John Degnan, Inc., were simply quotation letters offering its supplies at certain prices for any proposed work. At the time these letters were received John Degnan, Inc., had no contract for the plumbing work on this building; its contract for this work was not made until August 22, 1928. Complainant furnished the fixtures in accordance with the order of John Degnan, Inc., of December 11, 1928.

We cannot agree with the contention of defendants that there were two contracts. Manifestly there was only one contract to furnish the plumbing and fixtures for the building in question. The fact that after complainant had executed most of the contract and had refused to deliver the remainder of the goods unless it should be assured of receiving payment, which assurance was given by Paschen Brothers, the general contractors, did not divide the contract into two contracts. The materials were delivered in connection with one job in one building and cannot reasonably be divided into two separate contracts. A somewhat similar question was raised in Malleable Iron Co. v. Brennan, 174 Ill. App. 38, where it was contended there were two separate contracts, one for the installation of a bath and toilet and the other for the installation of a heating plant. The court held against this on the ground that both jobs were done on the same building, for the same owners, and usually done by the same workmen and are known as plumbers' jobs. See also Weil v. Bonash, 237 Ill. App. 544.

[illegible]

and furnished the figures in accordance with the order of John  
Sullivan for this work was not made until August 20, 1937. Sullivan  
Inc., had no contract for the plumbing work on this building; the  
last copy of the blue print set was received from Sullivan  
Inc. letters offering its supplies at certain prices for my pro-  
cess were made May 11, 1936, or July 8, 1936. The letters written  
apparently the canceller was at the opinion that the con-

Edward T. Sullivan, 107 W. 1st St.

Denver, Inc., at December 11, 1937

It cannot agree with the cancellation of the contract and the fact that the contract was not cancelled until after the contract was made. The fact that the contract was not cancelled until after the contract was made is not a defense to the contract. The fact that the contract was not cancelled until after the contract was made is not a defense to the contract. The fact that the contract was not cancelled until after the contract was made is not a defense to the contract.

of receiving payment, which amount was given by Federal Brothers, the general contractors, did not divide the contract into two contracts. The materials were delivered in connection with one lot in one bill and were not necessarily divided into two separate contracts. A somewhat similar question was raised in United States v. American Lumber Co., 174 Ill. App. 3d, where it was contended there were two separate contracts, one for the installation of a bath and toilet and the other for the installation of a heating plant. The court held against this on the ground that both jobs were done on the same building, for the same owner, and usually done by the same contractor and was in essence one contract. See also Wells v. American.



Defendant says complainant should not have stated the account as beginning April 1, 1929, but should have commenced the account at the dates when it first commenced delivering "roughing in" material to John Degan, Inc., and that complainant had no right to apply payments received from John Degan, Inc., on this account, as the rights of third parties, Paschen Brothers, are involved. The master properly found that, commencing September 1, 1928, and at intervals thereafter, complainant delivered large amounts of "roughing in" material to John Degan, Inc., but that complainant was paid in full for this material and none of it is included in the claim for mechanic's lien. Furthermore, there was no designation as to how the payments received by complainant should be applied. It is the rule that where the debtor does not so indicate, the creditor may apply such payments where he chooses. Liase v. Hentze, 326 Ill. 633.

As a further defense it is asserted that certain quantities of pipe delivered to John Degan, Inc., on September 1, 1929, were not used in the building. The evidence shows that the materials were delivered to the place of business of John Degan, Inc., and were used by it in another building upon which it then had the plumbing contract; complainant had no notice that said materials were to be used in this other building and they were billed to the general account of John Degan, Inc. The evidence shows that John Degan, Inc., paid this invoice and no lien is claimed for it.

Other points are presented upon which we do not think it necessary to comment as they do not affect the merits of the cause.

The master found the facts and stated the account correctly, and it was error to sustain the exceptions to his report.

The decree is therefore reversed and the cause remanded with directions to enter a decree in accordance with the recommendations of the master in chancery.

REVERSED AND REMANDED WITH DIRECTIONS.

Hatchett, P. J., and O'Connor, J., concur.



Defendant says complaint a suit has been filed in the  
 court on September 1, 1937, but should have commenced the  
 account of the fact when it first commenced delivering "roughing  
 in" material to John Deegan, Inc., and that complaint had no right  
 to apply payments received from John Deegan, Inc., on this account,  
 on the right of third parties, Trenchon Brothers, are involved. The  
 matter properly found that, commencing September 1, 1937, and at  
 intervals thereafter, complaint delivered large amounts of  
 "roughing in" material to John Deegan, Inc., but that complaint  
 was held in full for this material and none of it is included in  
 the claim for payment's item. Furthermore, there was no assign-  
 tion as to how the payments received by complaint should be ap-  
 plied. It is the rule that where the debtor does not so indicate,  
 the creditor may apply such payments where he chooses. Page 2.

Exhibit 100-101, 102.

As a further defense it is asserted that certain materials  
 of type identical to John Deegan, Inc., on September 1, 1937, were  
 not used in the building. The evidence shows that the materials  
 were delivered to the place of business of John Deegan, Inc., and  
 were used by it in another building upon which it then had the  
 building contract; complaint had no notice that said materials  
 were to be used in this other building and they were billed to John  
 Deegan, Inc., both the invoice and no lien is claimed for it.

Other points are presented upon which we do not think it  
 necessary to comment as they do not affect the merits of the cause.  
 The matter found the facts and stated the amount awarded, and it  
 was error to include the amount of said award.  
 The matter is affirmed reversed and the cause remanded with  
 directions to enter a decree in accordance with the remittitur  
 at the matter in controversy.

REVEREND AND HONORABLE JUDGE DICKSON.

Witnessed, J. L. and O'Brien, J., court.

37253

MINNIE GREENBERG,  
Defendant in Error.

vs.

CHICAGO CAB COMPANY,  
a Corporation,  
Plaintiff in Error.

INDEX TO SUPERIOR COURT  
OF COOK COUNTY.

274 I.A. 66

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the Chicago Cab Company and Leon Adell, to recover damages for personal injuries claimed to have resulted from a collision between an automobile in which plaintiff was riding, and a cab belonging to the defendant cab company and driven by defendant Adell, at the intersection of LaSalle and Division streets, Chicago. The jury returned a verdict finding defendant Chicago Cab Company guilty and assessing plaintiff's damages at \$21,250, and finding defendant Adell not guilty. Judgment was entered on the verdict and the cab company prosecutes this writ of error.

The record discloses that shortly before nine o'clock, daylight saving time, on the evening of July 2, 1931, there was a collision between a Dodge automobile in which plaintiff and five others were riding, and a taxicab belonging to the defendant cab company, in or near the northeast corner of the intersection of LaSalle street, a north and south street, and Division street, an east and west street, in Chicago; one of the persons riding in the Dodge was killed and the other five, which included plaintiff, testified.

The substance of the testimony of these five witnesses is that on the evening of the day in question Sam Blonder, 53 years old, who lived in Evanston, took his Dodge automobile to drive to the Seneca hotel, which is nearly a half mile south of Division street, and east of Michigan avenue. He took his wife, two





brothers-in-law and their two wives. The three women were sisters. After proceeding some distance they drove southeast in Elston avenue until they reached Division street, which is about a mile west of LaSalle street where the accident occurred. The car was then driven east in Division street until it reached LaSalle street where it was stopped, LaSalle being a through street. Blonder then started his car across LaSalle street, going at about fifteen miles an hour. As he did so, he saw the defendant's cab coming north in LaSalle street at about forty or forty-five miles an hour. Blonder thought he had time to pass in front of the cab but found he was not able to do so and turned his car toward the northeast to avoid a collision, but the cars collided and plaintiff was severely injured.

Jack L. Rogers, called by defendant, testified that he and his wife were standing in front of their home at 1206 North LaSalle street, which was a few doors north of Division street; that the Dodge car was coming south practically in the middle of LaSalle street at about forty or forty-five miles an hour; that there was a westbound street car in Division street (there being a double line of street cars in that street); that the driver of the Dodge car applied his brakes to avoid hitting the street car but could not stop; that the brakes "howled"; that he made a turn toward the east three or four feet back and east of the street car, and at that time the collision occurred; that he did not see the north bound cab until just at the time of the collision because the street car was crossing Division street.

Alma Rogers, wife of Jack L. Rogers, gave testimony substantially the same as that of her husband.

Everett Lee, called by defendant, testified that at the time of the accident he was walking west on the north sidewalk of Division street about sixty feet east of LaSalle street and saw the collision;

brother-in-law and their two sisters. The three women were also present.

After proceeding some distance they drove southeast in Division Avenue until they reached Division Street, which is about a mile west of Lathrop Street where the accident occurred. The car was then driven east in Division Street until it reached Lathrop Street where it was stopped, Lathrop being a through street. Alexander then started his car across Lathrop Street, going at about fifteen miles an hour. As he did so, he saw the defendant's car coming north in Lathrop Street at about forty or forty-five miles an hour. Alexander thought at that time he was in front of the car but found he was not able to do so and turned his car toward the southeast to avoid a collision, but was unable to do so and a collision was actually imminent.

Jack A. Rogers, called by defendant, testified that he and his wife were standing in front of their home at 1308 South Lathrop Street, which was a few blocks north of Division Street; that the Dodge car was coming south gradually in the middle of Lathrop Street at about forty or forty-five miles an hour; that there was a westbound street car in Division Street (there being a double line of street cars in that street); that the driver of the Dodge car applied his brakes to avoid hitting the street car but could not stop; that the brakes "skipped"; that he made a turn toward the east about a foot back and east of the street car, and at that time the collision occurred; that he did not see the north-bound car until just at the time of the collision because the street car was crossing Division Street.

Alma Rogers, wife of Jack A. Rogers, gave testimony substantially the same as that of her husband. Everett Lee, called by defendant, testified that at the time of the accident he was walking east on the south sidewalk of Division Street about thirty feet west of Lathrop Street and saw the collision.

that the Dodge car came south on LaSalle street; that a westbound street car in Division street was crossing LaSalle street; that he saw the cab coming north at about twenty or twenty-five miles an hour; that "What made me notice the sedan (the Dodge car) was the squeal of the brakes;" that it was coming south in LaSalle street at about thirty or thirty-five miles an hour; that at the time he was about sixty feet from the Dodge car; that the brakes on the Dodge "squealed;" that it turned east to avoid the westbound street car, missed the street car, and collided with the cab; and that the rear end of the street car was about the middle of LaSalle street when the collision occurred.

George K. Kolkau, called by defendant, testified that at the time in question he was talking with a friend in front of 1209 LaSalle street, on the east side of the street and a few doors north of Division street; that he saw the Dodge car coming south at about forty or forty-five miles an hour, practically in the center of LaSalle street; that he went to the scene of the accident and saw Mr. and Mrs. Rogers and Lee there; that a street car was going west in Division street and the Dodge car turned to the east in Division street and that the collision occurred in the south or eastbound street car tracks; that "I heard squeaking brakes;" that the driver of the Dodge car turned around just before the collision and was talking to the passengers in the car. This is substantially all the evidence in the record as to how the accident occurred.

Defendant contends the basis of plaintiff's case was the negligence of the driver of the taxicab, and therefore defendant could be held liable only under the doctrine of respondent superior; that since the jury by its verdict found the driver of the cab not guilty and judgment having been entered on the verdict and no appeal having been taken, the judgment is conclusive in favor of the defendant cab company. It is obvious that if the driver of the



that the Dodge car came south on Laramie street; that a Volkswagen  
about car in Division street was proceeding Laramie street; that he  
saw the car coming north of about twenty or twenty-five miles an  
hour; that "What made me notice the Dodge (the Dodge car) was the  
signal of the street;" "That it was coming south in Laramie street  
at about thirty or thirty-five miles an hour; that at the time he  
was about sixty feet from the Dodge car; that the Dodge on the  
Laramie "proceeded;" that he wanted to avoid the Volkswagen street  
car, missed the street car, and collided with the car; and that the  
rear end of the street car was about the middle of Laramie street  
when the collision occurred.

George E. Miller, called by defendant, testified that at  
the time in question he was traveling with a friend in front of 1308  
Laramie street, on the east side of the street and a few doors north  
of Division street; that he saw the Dodge car coming south at about  
twenty or twenty-five miles an hour, practically in the center of the  
Laramie street; that he was in the road at the collision and that  
and Mrs. Rogers and Lee there; that a street car was going west in  
Division street and the Dodge car turned to the east in Division  
street and that the collision occurred in the south of eastbound  
street and that "I never proceeded forward;" that the driver  
of the Dodge car turned or and just before the collision and was  
rolling to the passengers in the car. This is substantially all  
the evidence in the record as to how the accident occurred.  
The defendant contends the facts of plaintiff's case was the  
negligence of the driver of the taxicab, and therefore defendant  
could be held liable only under the doctrine of assumed liability;  
that since the jury by its verdict found the driver of the car  
not guilty and defendant having been found as the guilty and he  
having having been found, the judgment is conclusive in favor of  
the defendant and company. It is ordered that it be dismissed of the

cab was not guilty of negligence in driving the cab at the time in question, the defendant cab company could not be held liable on the doctrine of respondent superior. Chicago Tel. Co. v. Hayes, 121 Ill. App. 313; Anderson v. West Chicago St. E. R. Co., 200 Ill. 329; Billetre v. The Triale Tread Tire Co., 350 Ill. App. 550. The contention of defendant in this respect is not controverted by counsel for plaintiff in their brief, but they contend that since it was charged in the fourth count of the declaration that the defendant taxicab company permitted the taxicab in question to be operated without good and sufficient brakes, in direct violation of the statute, this constituted negligence on the part of the cab company irrespective of the conduct of the driver of the cab, for which plaintiff was entitled to recover. The difficulty with this contention is that there is no evidence in the record tending, in any manner, to show that the brakes of the taxicab were not in good working order, nor is there any evidence in the record that the brakes on the Dodge car were not in good condition. The only evidence on the question of brakes is that they "howled" or "squeaked" when the driver of the Dodge car applied them. This in no way indicated that they were out of repair.

While counsel for defendant argues at considerable length that the jury might well believe that the "squeak" of the brakes came from the brakes of the taxicab and not from the brakes of the Dodge car, we think this contention is contrary to all the evidence on this question. But in no event could it be material because there is no evidence that the brakes were out of order or defective merely because they "squeaked" when applied. Especially is this true as applied to the evidence in the instant case.

What we have just said in regard to the brakes is sufficient answer to plaintiff's contention that the court committed no

and was not guilty of negligence in driving the car at the time in question, the defendant was necessarily held liable on the doctrine of respondeat superior. Chicago Tel. Co. v. Hayes, 101 Ill. App. 2d 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

While counsel for defendant argues at considerable length that the jury might believe that the "supposed" of the driver came from the brakes of the vehicle and not from the brakes of the Dodge car, we think this contention is contrary to all the evidence on this question. But in no event could it be material because there is no evidence that the brakes were out of order or defective merely because they "supposed" were applied. People v. ... Two as applied to the evidence in the instant case. That we have just said in regard to the brakes is entirely in answer to plaintiff's contention that the court committed an



error in refusing to instruct the wilful and wanton count out of the declaration, as requested by defendant, because the declaration charged that the taxicab was permitted to be operated on the street without being properly equipped with brakes. There was no evidence to sustain this allegation.

From what we have said it is also unnecessary to pass on defendant's contention that the court erred in not permitting defendant cab company to explain why the taxicab driver was not called as a witness.

Since the jury found the taxicab driver not guilty, the defendant cab company could not be held liable on the doctrine of respondet superior, and since the plaintiff in this court predicates her right to sustain the judgment on the ground that the brakes of the taxicab were defective, and since we have held there was no evidence that they were in any way defective, there is nothing in the record to sustain the judgment; therefore the motion in arrest, made by defendant when its motion for a new trial was overruled, should have been sustained.

Plaintiff, unfortunately, was very severely and permanently injured; but in view of the record in this case the judgment can not stand. The judgment of the Superior court is reversed.

REVERSED.

Matchett, P. J., and McSurely, J., concur.

error in return to inspect the will and return same for of  
the defendant, as requested by defendant, because the defend-  
ant charged that the taxidermy was permitted to be operated on  
the street without proper permits and licenses. There  
was no evidence to sustain this allegation.

Now when we have said it is also unnecessary to show  
on defendant's contention that the court erred in not granting  
defendant and company to explain why the taxidermy driver was not  
called as a witness.

Now the fact that the taxidermy driver was called as  
a witness and company could not be held liable on the doctrine of  
respondeat superior. And since the plaintiff in this case prodi-  
ced evidence to show that the judgment on the ground that the  
taxidermy driver was defective, and since we have held  
there was no evidence that they were in any way defective, there  
is nothing in the record to sustain the judgment; therefore the  
motion is granted, made by defendant when the motion for a new  
trial was overruled, should have been sustained.

REVEREND, J. J., and REVEREND, J. J., concur.  
The judgment of the Superior Court is reversed.  
REVEREND, J. J., and REVEREND, J. J., concur.

37351

HOWARD EVANS,  
Appellee,

vs.

MRS. CHARLES STERN, alias  
MARY STERN, and CHARLES STERN,  
Appellants.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

274 I.A. 667<sup>1</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendants to recover damages claimed to have been sustained by him on account of being injured in an automobile collision, through defendants' negligence. There was a jury trial and a verdict and judgment in plaintiff's favor for \$5,000, and defendants appeal.

The record discloses that about 6:30 o'clock in the evening of July 17, 1932, plaintiff was driving his automobile south in State street and at the time defendant Mary Stern was driving an automobile west in 75th street; the cars collided and plaintiff was severely injured.

The evidence shows that at the time in question the defendant Mrs. Stern and several women companions had been bathing at the 75th street bathing beach and were returning home, Mrs. Stern driving the automobile west in 75th street, when the two cars collided as above stated.

Counsel for defendants contend that defendant Charles Stern had no knowledge of the use of the car by Mrs. Stern at the time in question, and had not authorized or knowingly permitted the use of the car by her; that "in fact, throughout the entire record the name of defendant Charles Stern is not mentioned at any time by any witness," and this position of defendants is not controverted.

The only contention made by defendants on this appeal is that the declaration charged joint operation, management and con-



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There was a heavy rain and a variable and light to moderate breeze. The temperature was 75 degrees Fahrenheit. The humidity was 75 percent. The wind was from the south at 10 to 15 miles per hour. The sky was overcast with scattered clouds. The visibility was 10 miles. The water was calm. The tide was out. The moon was in the third quarter phase. The stars were visible. The sun was not visible. The temperature was 75 degrees Fahrenheit. The humidity was 75 percent. The wind was from the south at 10 to 15 miles per hour. The sky was overcast with scattered clouds. The visibility was 10 miles. The water was calm. The tide was out. The moon was in the third quarter phase. The stars were visible. The sun was not visible.

The record indicates that about 6:30 a.m. on the evening of July 17, 1933, a light-colored sedan was driving on State Street and at the time defendant was driving in automobile west on 7th Street; the cars collided and defendant was severely injured.

The evidence shows that at the time the accident occurred, the car was being driven by the defendant, who was a woman. The car was a 1964 Ford Mustang, and it was traveling south on Highway 101. The car was struck by a truck, and it was thrown into the air. The car landed on the ground, and it was crushed. The driver was killed.

"I am not aware of anyone who has been mentioned as having been present at the time by any witness," and this position of defendant is not con-

- 1 -

The only connection made by defendant in this regard is

trol of the automobile by defendants; that this charge was out in issue by the defendants' plea of the general issue and that plaintiff's proof failed to establish any joint liability because there was no evidence tending to show that defendant Charles Stern had any connection with the case, and therefore the judgment being erroneous as to him it must, under the law as it existed at the time the cause of action arose, July 17, 1932, and prior to January 1, 1934, be reversed as to both defendants.

The declaration was in five counts. The second, fourth and fifth counts were withdrawn and the case tried on counts one and three. These counts charged that the "defendants were the owners and in possession of a certain motor vehicle which the defendants and their agents were then and there maintaining, operating and controlling in to-wit a westerly direction upon and along 75th street, etc., \*\*\* that the defendants and their agents so carelessly, negligently and recklessly maintained, operated and controlled said westbound motor vehicle," that by reason thereof defendants' automobile collided with the motor vehicle of plaintiff.

On the other hand, plaintiff's position is that the defendants by the plea of general issue admit the ownership and operation of the automobile at the time in question, and in support of this cites Mueller v. Hayes, 321 Ill. 275; Carlson v. Johnson, 263 Ill. 556; Chicago Union Traction Co. v. Jerka, 127 Ill. 95; McNulta v. Lockridge, 137 Ill. 270; Bates v. Drainage Commissioners, 273 Ill. App. 335, and other cases.

The Mueller case was an action to recover damages for personal injuries growing out of a collision between an automobile and a motorcycle at street intersections in Chicago. Floyd Hayes, son of George H. Hayes, the defendant, was driving the automobile at the time of the collision. The father alone was sued. The declaration alleged that the father and son were partners in the coal

tion alleged that the father and son were partners in the coal  
and the time of the collision. The father alone was sued. The declara-  
of George E. Hayes, the defendant, was driving the automobile at  
a motorcycle at street intersections in Chicago. Lloyd Hayes, son  
small injuries resulting out of a collision between an automobile and  
The Hayes case was an action to recover damages for per-  
sonal injuries, and other things.  
1924, 1925, and other years.  
Lombard, 147 Ill. 277; Hayes v. Chicago Union Trust Co., 277 Ill.  
554; Chicago Union Trust Co. v. Hayes, 277 Ill. 291; Hayes v. W.  
Hayes v. Hayes, 277 Ill. 277; Hayes v. Lombard, 277 Ill.  
of the automobile at the time in question, and in support of this  
made by the vice of general issue which the ownership and operation  
On the other hand, plaintiff's position is that the defend-  
ment alleged with the same result as liability.  
"motor vehicle," and by reason thereof defendant's auto-  
mobile and negligently maintained, operated and controlled with  
etc., that the defendant and their agents so negligently, nec-  
trolling in fact a motor vehicle upon and along North Street,  
and their agents were not lawfully authorized, operating and con-  
and in possession of a certain motor vehicle when the defendant  
three. These counts charged that the defendant was the owner  
with counts were withdrawn and the case tried on counts one and  
The position was in five counts, the second, fourth and



business under the name of Jefferson Park Coal Co., and that the son was driving the automobile at the time on the business of the partnership. In another count it was alleged that defendant, Hayes, was engaged in the coal business and employed his son Floyd as his agent and that Floyd was operating the automobile in the performance of his duties as the agent of his father at the time of the accident; and the third count was on the theory of the family automobile. The defendant filed the general issue and during the progress of the trial asked leave to file special pleas, which pleas were tendered with his motion. The pleas denied the existence of the partnership, denied that the automobile was being operated in the business of the alleged partnership, denied that the defendant was engaged in the coal business under the name of the Jefferson Park Coal Co., and that the son was operating the automobile as defendant's agent and denied that the son was a member of defendant's family. Another of the pleas set up that the Jefferson Park Coal Co. was a corporation of which the son was a stockholder, officer and employee and was not an employee or servant of his father, the defendant. The court denied defendant's motion for leave to file the pleas. The court said (p. 278): "No evidence was introduced by the plaintiff tending to prove that the Jefferson Park Coal Company was a partnership of which Floyd was a member, or that he was operating the automobile as an agent or servant of the defendant or on business of the defendant, \*\*\*

"For many years this court has held the doctrine that in actions on the case the general issue denies only the wrongful act alleged to have been committed and does not put in issue the ownership, possession or operation of the property or instrumentalities which have caused the injury. Allegations of such ownership, possession or operation are regarded as matters of inducement, only, which are not traversed by a plea of the general issue, and if the

business under the name of Jefferson Park Coal Co., and that the  
son was driving the automobile at the time on the business of the  
partnership. In another count it was alleged that defendant  
Hoyt, was engaged in the coal business and employed his son Wray  
as his agent and that Wray was operating the automobile in the  
performance of his duties as the agent of his father at the time  
of the accident; and the third count was on the theory of the family  
automobile. The defendant filed the general issue and during the  
progress of the trial asked leave to file special pleas, which pleas  
were tendered with his motion. The pleas denied the existence of  
the partnership, denied that the automobile was being operated in  
the business of the alleged partnership, denied that the defendant  
was engaged in the coal business under the name of the Jefferson  
Park Coal Co., and that the son was operating the automobile as  
defendant's agent and denied that the son was a member of defendant's  
family. Another of the pleas set up that the Jefferson Park Coal Co.  
was a corporation of which the son was a stockholder, officer and  
employee and was not an employee or servant of his father, the  
defendant. The court denied defendant's motion for leave to file  
the pleas. The court said (p. 278): "The evidence was introduced  
by the plaintiff tending to prove that the Jefferson Park Coal Com-  
pany was a partnership of which Wray was a member, or that he was  
operating the automobile as an agent or servant of the defendant or  
on business of the defendant, was  
"Yet every count which sets out the charges made in  
action on the case the general issue denied only the wrongful act  
alleged to have been committed and does not put in issue the aver-  
ment, possession or operation of the property or instrumentalities  
which were used in the act. Allegations of such ownership, posses-  
sion or operation are regarded as matters of inducement, only,  
which are not essential to a plea of the general issue, and if the

defendant desires to take issue on such particular facts, he must do it by special plea." The court then cites a number of authorities and in stating the nature of the rule said (p.279): "It is not a rule which applies only to railroad and municipal corporation and quasi public corporations." The court there further said (p.283): "The plaintiff in error (defendant) complains of the refusal of three instructions asked. They were properly refused, for they were predicated on the theory that the relationship of Floyd (defendant's son) to the plaintiff in error, as his servant and agent, in driving the automobile was not admitted, which we <sup>have</sup> held to be incorrect."

We think the Mueller case was decided on the theory that the son, in driving the automobile at the time in question, was the agent of his father and it was held that this fact was not denied by plea of the general issue; while in the instant case, the charge in the declaration is that both defendants committed the wrongful act. They are charged to be joint tortfeasors. The question of principal and agent is not in the case.

In Carlson v. Johnson, supra, (263 Ill. 556) which was an action for personal injuries, the court said the amended declaration charged that the defendant "by his servants and agents, was engaged in remodeling and repairing a building owned by him and that certain men were engaged in working upon the roof of said building;" that defendant "by his said servants and agents did so carelessly and negligently proceed with the work" that plaintiff was injured. The plea was not guilty. Before the commencement of the trial defendant asked leave to file a special plea by which he sought to set up that defendant, Johnson, was an independent contractor. From what we said, we think it obvious that the allegations of the declaration in the Johnson case are not at all similar to the charge made in the declaration in the case at bar.



defendant's failure to take issue on such particular facts, he was  
held by special plea. The court then cited a number of authori-  
ties and in stating the nature of the rule said (p. 375): "It is not  
a rule which applies only to negligent and criminal corporations and  
small public corporations." The court then stated (p. 375):  
"The plaintiff is error (defendant) because of the failure of  
three instructions asked. They were properly refused, for they  
were predicated on the theory that the relationship of Lloyd (de-  
fendant's son) to the plaintiff is error, as his servant and agent,  
in driving the automobile was not established, which would be to  
impose."

We think the English case was decided on the theory that  
the son, in driving the automobile at the time in question, was the  
agent of his father and it was held that this fact was not decided  
by plea of the general issue; while in the instant case, the charge  
in the decision is that both defendants committed the wrongful  
act. They are charged to be joint tortfeasors. The question of  
principal and agent is not in the case.

In English v. General, 203 Ill. 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

In the Rates case, supra, (273 Ill. App. 335) the declaration charged defendant with the commission of a tort by its agent, and it was held that the plea of the general issue did not put in issue the question of agency. The other cases cited are to the same effect.

This court has held that in a personal injury case where the declaration charges that defendants jointly committed the wrongful act, the plea of not guilty does not admit the joint ownership and operation of the instrumentality involved. McHale v. McQuigg, 236 Ill. App. 295; Blade v. Site of Ft. Dearborn Bldg. Corp., 245 Ill. App. 484; McDermott v. A.B.C. Oil Burner Sales Corp., etc., 268 Ill. App. 115.

The McHale case suit was brought to recover damages against Mr. and Mrs. McQuigg, plaintiff claiming damages as a result of being struck and injured by an automobile. The court there said (pp. 297-298): "There is a total lack of evidence as to any concert of action or common intent of defendants with reference to the operation of the automobile at the time of this accident. So far as the record shows, the defendant Mr. McQuigg neither owned the car nor operated it at any time and was entirely unaware of and unconnected with this particular trip. \*\*\*

"We hold that the defendants in this case cannot be made the subject of a joint judgment unless it can be held that their plea of general issue admits joint operation of the automobile when it struck plaintiff.

"Plaintiff alleged joint ownership and operation, and argues that the general issue admits both allegations under the rule announced in Chicago Union Traction Co. v. Jerke, 227 Ill. App. 88, and many other similar cases." The court then discusses another case and continuing said: "Under the rule of pleading long followed in this State, where the charge is joint liability, the proper plea

In the United States, Smith, (1975 Ill. App. 350) the defendant charged defendant with the commission of a tort by the agent, and it was held that the gist of the general issue did not put in issue the question of agency. The other issues cited are to the same effect.

This court has held that in a personal injury case where

the defendant charges that defendant's injury was caused by

wrongful act, the gist of the liability does not shift the joint

ownership and operation of the instrumentality involved. Smith

1975 Ill. App. 350, 1975 Ill. App. 350, 1975 Ill. App. 350, 1975 Ill. App. 350

1975 Ill. App. 350, 1975 Ill. App. 350, 1975 Ill. App. 350, 1975 Ill. App. 350

1975 Ill. App. 350, 1975 Ill. App. 350, 1975 Ill. App. 350, 1975 Ill. App. 350

The Smith case was brought to recover damages against

Mr. and Mrs. Smith, plaintiff claiming damages as a result of

being struck and injured by an automobile. The court there said

(p. 357-358): "There is a total lack of evidence as to any con-

joint or action of common intent of defendant with reference to the

operation of the automobile at the time of this accident. On the

one hand, the record shows, the defendant Mr. Smith was driving the

car and operated it at any time and was actively conscious of such

operation with this plaintiff's help."

"We hold that the defendant in this case cannot be made

the subject of a joint judgment unless it can be held that their

gist of general issue which joint operation of the automobile

was in common liability."

"Plaintiff alleged joint ownership and operation, and argues

that the general issue which both allegations under the rule are

announced in Illinois Smith, 1975 Ill. App. 350, 1975 Ill. App. 350, 1975 Ill. App. 350

and only after a full trial of the facts can the issue be decided.

There is no question as to the fact that the plaintiff's injury

in this case, where the charge is joint liability, the proper gist



for those not guilty is the general issue. Furington-Aimball Brick Co. v. Eckman, 102 Ill. App. 183.

"It is laid down in all works on pleading that if two or more persons are sued for a tort committed by one only, a misjoinder cannot be pleaded; the proper plea for those not guilty is the general issue." Yeazel v. Alexander, 83 Ill. 252; Economy Light & Power Co. v. Miller, 203 Ill. 513.

"We are referred to no cases changing this rule. It would be unreasonable to stretch the rule in the Jerka case to include the charge of joint liability." and the judgment against both defendants was reversed and the cause remanded.

The Blade case, supra, (245 Ill. App. 484) was an appeal from a judgment for \$25,000 for injuries received by being struck while on the street by a plank or board which it was alleged fell from the scaffolding of a building then in process of construction. It was there held that the general issue was the proper plea to a charge of joint liability. The court there said (p.489): "We have held, too, that where the charge is joint liability the proper plea for those not guilty is the general issue, and that it is unreasonable to stretch the rule in the Jerka case to include the charge of joint liability. (McHale v. Reming, 236 Ill. App. 295, 299.)"

The McDermott case, supra, (238 Ill. App. 115) was an appeal by the defendants to reverse a judgment for damages to plaintiff's real estate by the destruction of four large trees, and it was held that where two or more defendants are jointly charged with the commission of a tort, the joint action of the defendants is negatived by a plea of not guilty. On this point the court said (p. 120): "At the outset it is contended by plaintiff's counsel that since the Automatic Corporation pleaded only the general issue, plaintiff was not required to prove that the Automatic Corporation participated in the transaction between the plaintiff and the Sales Corporation. The point

For these not nullify is the general issue. Turner v. American 108 Ill. App. 188.

'It is held down in all cases on pleading that it is not

more persons are sued for a tort committed by one only, a defendant cannot be plaintiff; the proper plea for these not nullify is the gen-

eral issue. Yarnall v. American, 82 Ill. 288; Wheeler v. A

Lower Co. v. Miller, 108 Ill. 218.

"We are not bound to be more exacting than the law."

be necessary to sustain the rule in the Turner case to include the charge of joint liability." and the judgment against both defendants was reversed and the cause remanded.

The Turner case, Turner, (108 Ill. App. 188) was an appeal from

a judgment for \$25,000 for injuries received by being struck while on the street by a block of stone which it was alleged fell from the ceiling of a building then in process of construction. It was there held that the general issue was the proper plea to a charge of joint liability. The court there said (p. 188): "We have held, too,

that where the charge is joint liability the proper plea is that

not nullify is the general issue, and that it is unnecessary to

plead the rule in the Turner case to include the charge of joint

liability. (Turner v. American, 108 Ill. App. 188.)"

The Wheeler case, Wheeler, (82 Ill. App. 118) was an appeal

by the defendants to reverse a judgment for damages to plaintiff's real estate by the destruction of four large trees, and it was held that where two or more defendants are jointly liable with the usual issue of a tort, the joint issue is the proper plea to a charge of joint liability. On this point the court said (p. 118): "As the rule is not nullified by plaintiff's answer that since the defendants' negligence caused only the general issue, plaintiff was not required to state that the defendants' negligence was the cause of the injury. The court

is not well taken. Plaintiff's claim is founded upon and the declaration charges that the two defendants committed a tort.<sup>\*\*\*</sup> It has always been the law that where two or more defendants are jointly charged with the commission of a tort the joint action of the defendants is negatived by a plea of not guilty. (Yeazel v. Alexander, 58 Ill. 254; Peters v. Howard, 306 Ill. App. 610; Sciale v. McQuigg, 236 Ill. App. 395, 398; Blade v. Site of Ft. Dearborn Bldg. Corp., 245 Ill. App. 484, 489.)"

In the instant case we hold that the plea of not guilty negatived the joint tort charged against the defendants and since there was no proof made against defendant Charles Stern, and since under the old law which is applicable to the instant case, which holds that the judgment against several defendants is a unit, it cannot be reversed as to one defendant and affirmed as to the other (Livak v. Chicago & Erie R. R. Co., 209 Ill. 218,) the judgment must be reversed and the cause remanded.

Plaintiff contends that it is the law that one may not try a case in the trial court on one theory and then shift to another theory in a court of review and that this is what defendants attempt to do in the instant case; that they both joined in a plea of not guilty and in a special plea, in which they denied they owned, operated or controlled the automobile in question; and that on the day of the trial, after the jury had been sworn, the defendants withdrew their special plea and the case went to trial on defendants' joint plea of the general issue. And plaintiff further contends that at the close of plaintiff's case both defendants joined in a motion to exclude all the evidence and to instruct the jury to find the defendants not guilty, accompanied by a single instruction, and that at the close of all the evidence they made a similar motion and tendered a similar instruction to find both defendants not guilty; that the defendants presented a number of instructions, all of which



is not well taken. Plaintiff's claim is founded upon the fact  
that the defendant committed a tort. It  
has always been the law that where two or more defendants are  
jointly charged with the commission of a tort the joint action of  
the defendant is negatived by a plea of not guilty. (Kearney v.  
Alexander, 28 Ill. 2d; Foster v. Weaver, 202 Ill. App. 610; Bell  
v. Bell, 202 Ill. App. 208; Bell v. Bell, 202 Ill. App. 208.)

In the instant case we hold that the plea of not guilty  
negatived the joint tort charged against the defendant and since  
there was no proof made against defendant Robert Bell, and since  
under the old law which is applicable to the instant case, which  
exists until the judgment and reversal of the same, it  
cannot be reversed as to one defendant and affirmed as to the other  
(Black v. Chicago & Erie R. Co., 202 Ill. 2d), the judgment  
must be reversed and the case remanded.

Plaintiff contends that it is the law that one may not try a  
case in the trial court on one theory and then shift to another  
theory in a court of review and that this is what defendant attempted  
to do in the instant case; that they both joined the plea of not  
guilty and in a special plea, in which they denied they owned, op-  
erated or controlled the automobile in question; and that on the  
day of the trial, after the jury had been sworn, the defendant  
withdrew their special plea and the case went to trial on defendant's  
joint plea of the general issue. and Plaintiff further contends  
that at the close of Plaintiff's case both defendants joined in a  
motion to examine all the evidence and to instruct the jury to find  
the defendant not guilty, accompanied by a single instruction, and  
that at the close of all the evidence they made a similar motion and  
requested a similar instruction to find both defendants not guilty;  
that the defendant presented a number of instructions, all of which

were given except two which the court refused; that one of these instructions was a joint instruction on behalf of both defendants and did not indicate to the jury "that the jury should consider separately the liability of either defendant." There is some merit in plaintiff's contention. After the jury was sworn, the defendants did withdraw their special plea, denying special ownership, operation and control of the automobile, and made a joint motion at the close of plaintiff's evidence and at the close of all the evidence tendered an instruction to find "the defendants" not guilty. But whether this action on the part of the defendants lulled plaintiff into the belief that the ownership and operation of the automobile by both defendants was not controverted and that only the wrongful act was denied, does not appear, nor is there any intimation that plaintiff could have produced witnesses or evidence of any character tending to show that defendant Charles Stern was in any way liable for the unfortunate accident in which plaintiff was severely injured and his automobile greatly damaged. Moreover, defendants, by their offered instruction which the court refused, sought to have the court tell the jury that the charge made by plaintiff against defendants was that defendants owned and operated the automobile at the time of the collision, and unless the jury believed from the evidence that the automobile was operated and controlled by both defendants, as charged, then they should find the defendants not guilty.

We think the record fails to disclose that plaintiff was prejudiced by the defendants' action in withdrawing their special plea. Since the law in effect at the time of the accident in this case and at the time of the trial prevents a judgment against two persons to be affirmed where it is wrong against one of them, and since we hold that there is no evidence against the defendant Charles Stern, the judgment cannot stand.

The judgment of the Superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

were given except two which the court retained; that one of those instructions was a joint instruction on behalf of both defendants and did not indicate to the jury "that the jury should consider separately the liability of either defendant." There is some merit in plaintiff's contention. After the jury was sworn, the defendant withdrew their special plea, denying special ownership, operation and control of the automobile, and made a joint motion at the close of plaintiff's evidence and at the close of all the evidence tendered in objection to this "the defendant's" not guilty. But whether this action on the part of the defendant failed plaintiff into the belief that the ownership and operation of the automobile by both defendants was not controverted and that only the wrongful act was denied, does not appear, nor is there any indication from plaintiff's evidence that defendant Charles Brown was in any way liable for the automobile accident in which plaintiff was severely injured and his automobile greatly damaged. However, defendant, by their offered instruction which the court refused, sought to have the court tell the jury that the charge made by plaintiff against defendant was that defendant owned and operated the automobile at the time of the collision, and unless the jury believed from the evidence that the automobile was operated and controlled by both defendants, as charged, then they should find the defendant not guilty.

To whom the record falls to decide that plaintiff was prejudiced by the defendant's action in withdrawing their special plea. Since the law is clear at the time of a collision in this case and at the time of the trial provided a judgment against two persons to be affirmed there it is wrong against one of them, and

about a half hour there is no witness against the defendant Brown. The judgment of the superior court of some county is reversed and the cause remanded.

REVEREND AND HONORABLE



36737

99 H

THE PEOPLE OF THE STATE OF  
ILLINOIS ex rel. OSCAR E.  
CARLSTROM, Attorney General,  
Defendant in Error,

v.

ILLINOIS STATE AUTOMOBILE  
ASSOCIATION, a corporation,  
Plaintiff in Error.

ERROR TO SUPERIOR  
COURT, COOK COUNTY.

274 I.A. 667<sup>2</sup>

MR. PRESIDING JUSTICE SULLIVAN  
DELIVERED THE OPINION OF THE COURT.

This writ of error seeks the reversal of a decree of dissolution of the Illinois State Automobile Association, a corporation (hereinafter referred to as defendant), entered by the Superior court April 17, 1931. An information in the nature of a bill in chancery was filed February 10, 1931, against defendant by the attorney general for and on behalf of the People of the State of Illinois (hereinafter referred to as complainant) for such dissolution, under the provisions of paragraphs 195 and 196, chapter 32, Cahill's 1929 Revised Statutes of Illinois, which are as follows:

"Par. 195. That whenever the board of directors, managers, trustees or officers of any corporation existing by virtue of any general or special law of this state, or any corporation hereafter organized by virtue of any law of this state, has ceased to do business as a corporation, or has discontinued the exercise of corporate functions, such corporation shall be deemed to have abandoned its corporate franchises and it shall be lawful for the Attorney General to institute proceedings, \*\*\* for the dissolution of such corporation."

"Par. 196. Such proceedings shall be commenced by filing in such court an information in the nature of a bill in chancery, stating the name and date of the organization of such corporation, the location of its principal office and the names of its directors, managers, trustees or officers, if known; that it has ceased to do



business as a corporation, and has discontinued the exercise of corporate functions, and praying for its dissolution."

The pertinent and material portions of the decree are as follows:

"And now on this day comes the complainant, the People of the State of Illinois, upon the information of Oscar S. Carlstrom, Attorney General, and it appearing to the court from the writ issued herein to the sheriff of Cook County, Illinois, and his return thereon, that the defendant, the said ILLINOIS STATE AUTOMOBILE ASSOCIATION, a corporation, has been duly served with summons ten days before the return day thereof; \*\*\* it is therefore ordered, adjudged and decreed that the said bill be taken as confessed against the said ILLINOIS STATE AUTOMOBILE ASSOCIATION, a corporation.

"And thereupon this cause coming on for final hearing upon the bill taken as confessed by the said defendant, upon the exhibits and testimony heard in open court, and the cause having been argued by counsel, and the court being fully advised in the premises, doth find, that the court has jurisdiction of the subject matter of this cause and of all the parties herein named, that the material allegations contained in the complainant's bill are true as therein stated and that the equity of the cause is with the complainant.

"The court further finds that the ILLINOIS STATE AUTOMOBILE ASSOCIATION was incorporated in the year 1906, under and in accordance with the provisions of an act of the General Assembly of the State of Illinois governing corporations not for pecuniary profit. \*\*\*

"That the said defendant and its board of directors have since the year 1906 ceased to transact business as a corporation, and discontinued the exercise of corporate functions. \*\*\*

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the court that the said defendant corporation, the ILLINOIS STATE AUTOMOBILE ASSOCIATION, be and the same is hereby dissolved, and that the charter and authority of said corporation be, and the same is hereby declared to be null and void, \*\*\* and that the clerk of this court certify the fact of such dissolution to the Secretary of the State of Illinois."

April 23, 1932, defendant appeared in the cause and filed a petition signed and verified by one E. E. Brismann as its secretary, asking that the decree of dissolution of the corporation entered April 17, 1931, be vacated and set aside. This petition alleged that defendant was incorporated July 22, 1906, as a corporation, not for profit, and that since that date it continuously transacted business under its charter; that it only recently was advised of the decree of dissolution of April 17, 1931; that it was not at any time served with summons; that the two writs of summons issued





herein - one dated February 16, 1931, returnable to the April, 1931, term of the Superior court, which commenced April 6, 1931, and another dated February 23, 1931, returnable to the same term - were served on one Sidney S. Gorham as secretary and agent of defendant March 31, 1931; that Sidney S. Gorham was not on said date, at any time since nor for ten years prior thereto an officer or agent of defendant corporation authorized or empowered to accept service of process; that one T. J. Schmiel was president and F. E. Brtsmann was secretary of defendant; that each of such writs of summons was served less than ten days before the first day of the April, 1931, term of the Superior court of Cook county, and that the court was therefore without jurisdiction to enter the decree; and that the proceeding was had without knowledge or notice to defendant and the court was without jurisdiction over it. The petition concluded with a prayer that either the decree be vacated and service of summons quashed or that the petition be permitted to stand as an answer and defendant allowed to appear and defend. Leave was granted by the court to defend and that the petition stand as an answer to the bill of complaint.

Thereafter on June 16, 1932, pursuant to leave of court, complainant filed its answer to the petition. The answer was verified by William C. Clausen, an assistant attorney general, and denied that defendant had carried on its business under its charter since July 23, 1905; and denied that defendant had not ceased to function as a corporation. It averred that defendant corporation had not functioned for more than twenty four years and that it ceased to do business under its charter on or before July 23, 1907; that the board of directors and officers and agents of defendant have ceased to function as such since that date; that there have been no regular or special meetings of the members of defendant since that time, and that it has in no way exercised any of its

herein - one dated Wednesday 10, 1931, transmittal to the 1931.  
 1931, same of the suspension order, which commenced April 6, 1931.  
 and another dated January 28, 1931, transmittal to the same date -  
 were served on one Sidney A. Gordon as secretary and agent of  
 defendant March 21, 1931, and Sidney A. Gordon was not on said  
 date, at that time since he had been under arrest in office  
 in regard to defendant's suspension order, and was not in a  
 position to receive the same. The same was received and to the  
 defendant was necessary at defendant's trial each of such order of  
 suspension was served upon him two days before the trial day of the  
 April, 1931, same of the suspension order of said order, and that  
 the court was therefore without jurisdiction to enter the decree  
 and that the proceeding was had without knowledge or notice to  
 defendant and the court was without jurisdiction over it. The  
 petition was filed with a copy of the same to the court in which  
 and notice of removal was given of that the petition be permitted to  
 stand as an answer and defendant allowed to appear and defend.  
 leave was granted by the court to defend and that the petition  
 stand as an answer to the bill as requested.  
 The court on May 12, 1931, granted to leave of absence  
 defendant filed its answer to the petition. The answer was  
 verified by William G. Spencer, an admitted attorney general, and  
 denied that defendant had entered on the business under the charter  
 since July 21, 1931, and denied that defendant had not entered on  
 location as a corporation. It averred that defendant corporation  
 had not been formed and that the same was not in existence on July 21,  
 1931, and that the same was not in existence on July 21, 1931,  
 that the facts of defendant's suspension and arrest and removal of defendant  
 have been in violation of the laws of the State of New York and that  
 there was no legal or proper meeting of the members of defendant  
 since that time, and that it has in no way conducted any of its



charter powers or performed any of the functions for which it was chartered for more than twenty four years. It denies that defendant only recently learned of the entry of the decree of April 17, 1931, and avers that the last legally elected directors of defendant had actual knowledge of the entry of the decree and in effect consented to the entry of same.

The answer admits that the returns on the summonses set forth in the petition show that they were served less than ten days before the first day of the April, 1931, term of the Superior court, but avers that a writ of summons was served on a director and agent of defendant more than ten days before the first day of the April, 1931, term of that court, and that this summons with the proper return of the sheriff as to service thereof was exhibited to the court at the time the default was taken and the decree of dissolution entered.

The answer alleges that before the institution of the dissolution proceedings the matter of dissolving the defendant corporation was discussed with Mr. Sidney S. Gorham and others, the last known members of the board of directors of defendant, and that representatives of complainant <sup>were</sup> advised that defendant had long since ceased to do business as a corporation, and that there was no objection on the part of defendant or its regularly elected officers to such dissolution. It denies that Sidney S. Gorham was not an officer, director or agent of defendant at the time of service of summons upon him and avers that there is on file in the office of the recorder of deeds of Cook county, Illinois, the certificate of organization of defendant under the seal of the corporation giving the names of the persons elected directors of defendant as required under the Corporation act, and that such recorded certificate discloses that Sidney S. Gorham, among others, was elected a director of defendant corporation.

order books or papers or any of the evidence for which it was  
 searched for more than twenty four years. It further states  
 defendant only recently learned of the entry of the books of  
 April 17, 1931, and even then the fact legally stated  
 of defendant and actual knowledge of the entry of the books  
 and its effect commenced at the entry of same.

The answer admits that the records on the defendant's  
 books in the petition show that they were not in the hands  
 before the first day of the trial, 1931, from of the defendant's  
 but were that a wife of defendant was served on a subpoena and  
 of defendant were then in the hands of the first day of the trial,  
 1931, from of that court, and that this answer with the proper  
 return of the writ of habeas corpus was returned to the  
 court at the time the writ was taken and the books of defendant  
 returned.

The answer admits that before the filing of the  
 petition defendant was in the hands of the defendant  
 corporation and defendant with it, through a broker and agent,  
 the last known address of the books of defendant at defendant,  
 and that representative of defendant at defendant  
 had been named as a witness in a corporation, and that  
 there was no objection on the part of defendant or its representative  
 against efforts to such defendant. It further states that  
 Gordon was not an officer, director or agent of defendant at the  
 time of entry of same, and even that there is no  
 title in the office of the recorder of deeds of Cook county,  
 Illinois, the certificate of organization of defendant under the  
 act of the corporation giving the names of the persons elected  
 directors of defendant as required under the Corporation act,  
 and that such records are in the hands of the recorder of  
 Cook county, and that a director of defendant corporation.

The answer further avers that there has been no other certificate filed in the office of the recorder of deeds of Cook county, Illinois, showing the election of any other directors or officers since the original certificate was filed with such recorder.

It also denies that F. J. Schmidt or F. E. Kriemann were then or ever had been duly elected and qualified as president and secretary of defendant, that either of them had authority to sign the petition presented to the court, or that either of them has authority to prosecute the petition to vacate the decree of dissolution entered April 17, 1931.

It then avers that after the entry of the decree April 17, 1931, a new corporation under the name of the Illinois State Automobile Association was chartered by the secretary of state; that the new corporation proceeded with its organization and at once engaged in the business for which it was organized; that it has expended large sums of money in the building up of its business; and that it acquired thousands of members and has been actively engaged in the performance of its functions ever since the date of its incorporation. It further avers that defendant and all persons who were its officers prior to April 17, 1931, had knowledge of the entry of the decree of dissolution and of the activities of the new corporation in the building up of its business, and prays that the petition be dismissed and the decree confirmed.

Defendant's principal contention is that the trial court was without jurisdiction to enter the decree in question or any decree, inasmuch as the record discloses that summons was served March 31, 1931, for the April, 1931, term of court, which service was less than ten days before the first day of that term. Complainant's theory is that its answer (to defendant's petition to vacate the decree of dissolution) alleging that a summons other



The answer further avers that there has been no other corporation  
filed in the office of the recorder of deeds of Cook County, Illinois,  
showing the location of any other divisions or offices since the  
original corporation was filed with such records.

It also avers that T. J. Schmidt or T. J. Schmidt was  
then or ever had been duly elected and qualified as president and  
secretary of defendant, that either of them has authority to sign  
the petition presented to the court, or that either of them has  
authority to prosecute the petition to enforce the terms of  
incorporation entered April 17, 1911.

It then avers that after the entry of the answer April  
17, 1911, a new corporation under the name of the Illinois State  
Automobile Association was organized by the secretary of defendant  
that the new corporation proceeded with the organization and at  
once engaged in the business for which it was organized; that it  
has expended large sums of money in the building up of its business  
and that it acquired thousands of members and has been actively  
engaged in the performance of its functions ever since the date of  
its incorporation. It further avers that defendant and all persons  
who were its officers prior to April 17, 1911, had knowledge of the  
entry of the decree of dissolution and of the activities of the new  
corporation in the building up of its business, and knows that the  
petition is dismissed and the decree confirmed.

Defendant's principal contention is that the trial court  
was without jurisdiction to enter the decree in question or any  
decree, inasmuch as the record discloses that summons was served  
March 21, 1911, for the April, 1911, term of court, which service  
was made two days before the first day of that term. Con-  
sequently, it avers, the court was without jurisdiction to enter the  
decree and the petition should be dismissed.

than those appearing in the record was served on defendant more than ten days before the first day of the April, 1931, term, and that this summons with the sheriff's return thereon was exhibited to the chancellor before the decree was entered, raised an issue of fact on the question of the service of summons which, with all other questions of fact presented by the pleadings, is still pending in the trial court for disposition by the chancellor upon submission of proper proofs.

Defendant made its first appearance in this cause more than a year after the decree was entered and then asserted that it was appearing specially and for the sole purpose of securing leave to file its petition and urging its motion therein contained to vacate and set aside the decree of dissolution. After issue was joined on its petition by complainant's answer it not only did not request a hearing but when the cause was reached for trial April 27, 1933, defendant's motion to continue the cause generally was granted by the court.

The record filed here by defendant does not contain its petition to vacate the decree nor complainant's answer thereto. These proceedings were furnished to this court by an additional record filed by complainant. By omitting its petition to vacate and complainant's answer from the record it is obvious that defendant did not desire to have the same considered on the issue presented for our determination.

In view of the recital in the decree that the "Illinois State Automobile Association, a corporation, has been duly served with summons ten days before the return day thereof," and in view of the averments of complainant's answer that a summons (other than the two shown by the record to have been served upon Sidney S. Gorham less than ten days before the first day of the April, 1931, term of court) was served on a director and agent of defendant more

then those appearing in the record are correct on defendant's motion  
then ten days before the trial day of the 19th, 1901, some  
that this woman with the child's return should be admitted  
to the attention before the court was secured, raised on issue  
of fact on the question of the service of summons which, with all  
other questions of fact presented by the pleadings, is still pending  
in the trial court for disposition by the chancellor upon submission  
of proper proofs.

Defendant moves for this judgment in this cause more  
than a year after the cause was entered and then asserted that  
it was dismissed specially and for the sole purpose of securing  
leave to file the petition and waive the motion to dismiss  
as waste and not raise the question of disposition. After issue  
was joined on the question by complainant's answer it not only did  
not present a hearing but when the cause was reached for trial  
April 27, 1902, defendant's motion to continue the cause generally  
was granted by the court.

The record filed here by defendant does not contain the  
petition to vacate the decree nor complainant's answer thereto.  
These proceedings were continued on this case by an additional  
record filed by complainant. By omitting the petition to vacate  
and complainant's answer from the record it is obvious that  
defendant did not begin to move the case submitted on the issue  
presented for our determination.  
In view of the record in the cause that the "Illinois  
State Bar Association" is a corporation, and that it is  
with numerous ten days before the return day thereof, and in view  
of the averments of complainant's answer that a summons (other than  
the one shown by the record) is being given under alias  
before issue was ten days before the trial day of the 19th, 1901,  
court of court) was served on a director and agent of defendant more



than ten days before the first day of the April, 1931 term, and that such summons, including the sheriff's return thereon, was exhibited to the court at the time the default was taken and the decree entered, we are unable to agree with defendant's contention that the decree should be reversed by us on a question of law while the cause is pending in the Superior court on undetermined issues of fact on the identical question presented here, as well as on other questions raised in the trial court on defendant's petition to vacate the decree. We are of the opinion, rather, that this writ of error is unjustified in view of the fact that defendant on its own motion secured leave to defend and is defending this cause on its merits in the Superior court. The cause now stands continued generally in the court below on defendant's motion and it may on notice of either party be called up and reinstated for final determination. We are compelled to the conclusion that in the present state of the record the decree of April 17, 1931, is not final and that the cause is still pending and undetermined in the Superior court.

In the view we take of this cause we deem it unnecessary to discuss other points which have been urged.

For the reasons indicated the writ of error should be and it is dismissed.

WRIT OF ERROR DISMISSED.

Gridley and Scanlan, JJ., concur.

That the error should be reversed by no on a question of law while the case is pending in the Superior Court on a writ of habeas corpus. The error is not a question of law, as well as on other questions raised in the writ court on defendant's petition to vacate the sentence. The error is the question whether that this writ of error is warranted in view of the fact that defendant in the writ motion required leave to defend and in obtaining this leave on the merits in the Superior Court. The error now stands sustained generally in the writ court on defendant's motion and is now on notice of other party to be called up and reheard for final determination. We are compelled to the conclusion that in the present phase of the record the degree of error is not final and that the case is still pending and undetermined in the Superior Court.

It is the view of this court on such an error is unnecessary to affirm that points will be made.

You the Supreme Court should be

and is in affirmed.

• 400 mg 3 times a day in 2 or 3 tablets

\*continued on page 54\*

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

36961

THE PEOPLE OF THE STATE OF ILLINOIS,  
Defendant in Error,

v.

ARTHUR E. GLADER,  
Plaintiff in Error.

ERROR TO MUNICIPAL  
COURT OF CHICAGO.

274 I.A. 667<sup>3</sup>

MR. PRESIDING JUSTICE SULLIVAN  
DELIVERED THE OPINION OF THE COURT.

Upon a trial by the court without a jury Arthur E. Glader was found guilty of violating section 9 of the Blue Sky Law (Ch. 32, Cahill's 1931 Illinois Revised Statutes, par. 254 et seq.), and judgment was entered sentencing him to pay a fine of \$1,000 and costs. He seeks by this writ of error to reverse the finding and judgment.

November 21, 1932, the state's attorney of Cook county, upon the complaint and affidavit of one Charles L. Hebling, filed an information alleging that July 12, 1932, Glader, an officer of the Glader Corporation, did unlawfully sell to Hebling securities defined in and by the Illinois Securities Act, without compliance with and in violation of the provisions of that act, and without having filed in the office of the secretary of state of Illinois the necessary statement and documents pursuant to the provisions of section 9 of the act; and that defendant sold 100 shares of the capital stock of the Glader Corporation to Hebling, which securities were not exempt from compliance with the provisions of the act, and not exempt from that provision which required that the statement and documents of the issuer, specified in and



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STATE OF TEXAS

2400 HRS. 100 TONS.

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A SOURCE OF INFORMATION AND CONVICTION

and treated. He made up this part of notes he received from Lindley and asked. He made up this part of notes he received from Lindley and asked. He made up this part of notes he received from Lindley and asked.

November 22, 1904, the State's Attorney of Cook County, upon the complaint and affidavit of one Charles L. Deering, filed an information against said John W. Deering, Clerk of the Illinois State Board of Education, for violation of the provisions of that act, and without having filed in the office of the Secretary of State of Illinois the necessary statement and documents pursuant to the provisions of section 10 of the act, and that defendant said John W. Deering, Clerk of the Illinois State Board of Education, which section reads: "The clerk of the State Board of Education shall not accept any money from any person without the provision of the act, and not except from that provision which requires him to file in the office of the Secretary of State of Illinois a statement and documents of the income, specified in said

by the act, be filed in the office of the secretary of state as a condition precedent to the right to sell or offer for sale such stock within the State of Illinois. Defendant entered a plea of not guilty.

The state offered in evidence the certificate of the secretary of state showing noncompliance with the provisions of section 9 of the act requiring the filing of the statement and documents prescribed in that section. It appeared that defendant had been engaged in the employment agency business for many years under the name of Glader Employment Agency until June, 1932, when the Glader Corporation was incorporated and succeeded to the business; that defendant was president and the principal stockholder of such corporation; that after many visits to defendant's office seeking placement in a position, both before and after the incorporation of defendant's business, and after many interviews with defendant, a written contract was entered into between Abeling and the Glader Corporation wherein Abeling agreed to purchase from the corporation and the corporation agreed to sell and issue to him 100 shares of its common stock for \$1,000, and the corporation also agreed to employ him as a placement man at \$150 a month and to repurchase the stock from him for \$1,000 upon his giving it sixty days notice of his desire to dispose of same within ninety days from July 15, 1932, the date of the execution of the contract; that defendant executed the contract for the Glader Corporation as its president; that when Abeling paid for the stock he was given the corporation's receipt signed by defendant as president and that the receipt recited "the understanding \*\*\* is that \$1,000 is to be paid to the Glader Corporation;" that the \$1,000 was deposited in the corporation bank account and the certificate for 100 shares of stock was issued and delivered to Abeling; that after a short time Abeling

by the sale he filed in the office of the secretary of state as a condition precedent to the right to sell or offer for sale such stock within the State of Illinois. Defendants answered

a plea of non est.

The state offered in evidence the certificate of the

necessity of state showing noncompliance with the provisions of

section 8 of the act requiring the filing of the statement and

documents prescribed in that section. It appeared that defendant had been engaged in the management agency business for many years under the name of Glaser Management Agency with June, 1933, when

the Glaser Corporation was incorporated and succeeded to the

business. That defendant was president and the principal

manager of such corporation from after said date to

defendant's office during defendant in a position of trust and

and after the incorporation of defendant's business, and after

many corporations and companies, a certain number of which

have been formed and the Glaser Corporation therein being

formed in January from the corporation and the corporation

as well and leave in his 100 shares of the common stock for 1933

and the corporation also agreed to repay him as a shareholder and

of 1933 a month and so repurchase the stock from him for 1933

upon his giving in stock says notice of his desire to dispose of

such stock and to pay him July 1, 1933, the date of the

expiration of the contract. That defendant executed the contract

for the Glaser Corporation as its president and that defendant

paid for the stock he was given the corporation's two-year

by agreement on condition and that the receipt recited "the

corporation" and that the 11,000 was deposited in the corporation

bank account and the certificate for 100 shares of stock was

issued and delivered to defendant and after a short time



was discharged from his position; and that thereafter he tendered the stock to defendant and demanded the return of his money, which demand was refused.

Defendant's evidence was to the effect that the entire \$10,000 capital stock of the corporation was subscribed and issued at the time of its incorporation; that the stock sold to Ebeling belonged to defendant and not to the corporation; and that although the \$1,000 paid by Ebeling for the stock was originally deposited in the Glader Corporation bank account, it was thereafter appropriated by the corporation to defendant's personal use.

Defendant contends that the finding and judgment are against the manifest weight of the evidence; that the sale was within the exemption of class "B" securities (par. 358, subsection 2, section 5 of the act), in that it was an isolated or individual sale by an owner of his own property for his own account; and that the state failed to prove that the stock sold to Ebeling by defendant was of the class that required the filing in the office of the secretary of state of the statement in writing and the documents required under section 5 as a condition precedent to the sale of such stock.

The theory of the state is that the sale of the stock under consideration did not come within the exemption of class "B" securities as provided in subsection 1 of section 5, and that in any event the burden was on defendant to prove such exemption, which it entirely failed to do.

Substantially the same questions as are presented for determination in the instant case were decided by our Supreme Court in the People v. Johnson, 335 Ill. 380, where, in reversing the judgments of both the Appellate and Municipal courts entered in a similar prosecution for violation of the Blue Sky Law, the

the testimony from his position and that testimony is binding on the stock to defendant and defendant the return of his money, which

should be returned.

Defendant's evidence was to the effect that the entire \$10,000 capital stock of the corporation was subscribed and issued at the time of its incorporation; that the stock was sold to defendant and defendant was not at the incorporation; and that although the \$1,000 paid by defendant for the stock was originally deposited in the first corporation bank account, it was thereafter withdrawn by the corporation as defendant's personal use.

Defendant contends that the finding and judgment are against the manifest weight of the evidence; that the sale was within the exemption of class "B" securities (Gen. Stat., subsection 1, section 2 of the code); in that it was an issuance of individual sale by an owner of his own property for his own account; and that the same failed to prove that the stock was sold to defendant and at the time that required the filing in the office of the secretary of state of the document in return for the document required under section 2 of a condition precedent to the sale of such stock.

The theory of the case is that the sale of the stock and the corporation did not come within the exemption of class "B" securities as provided in subsection 1 of section 2, and that in any event the burden was on defendant to prove such exemption, which it entirely failed to do.

Subsequently the same question was presented for determination in the instant case and was decided by our supreme court in the People v. Johnson, 201 Ill. 520, where, in the opinion of the court, the defendant and defendant's counsel urged in a similar presentation for violation of the same law, the



court held at pp. 388 and 389:

"This case must be decided under the provisions of the Illinois Securities act in force at the time of the sale, and all references to such act are to the act in force at such time. \* \* \* There was no evidence by the People to show whether the stock traded to Dougherty was class 'A,' 'B,' 'C' or 'D.' The record is barren of the financial standing of the company in either July or September, 1929, what its assets and liabilities were and whether it was solvent or insolvent. \* \* \*

"While the certificate of the Secretary of State offered in evidence proved prima facie that the Fairfax Company had not complied with either paragraph (a) or (b) of section 7 of the Illinois Securities act, yet it did not prove that the securities of the company were in either class 'C' or class 'D' nor did it prove that such certificates were class 'A' or class 'B' securities. Evidence must be produced by the People showing in what classes the securities belonged in a prosecution under the act. If the proof shows that the securities were class 'C' or class 'D' securities, then the certificate of the Secretary of State, as provided by paragraph 5 of section 37, becomes material and competent, but without evidence to show that the securities in question are class 'C' or class 'D' the certificate of such secretary is neither material nor competent. The burden was not on the defendant to prove within what statutory definition the securities of the Fairfax Company fell, but it was the duty of the People to prove beyond a reasonable doubt that the securities were either class 'C' or class 'D' securities. This could be done by direct proof of that fact or by proof that the securities were not in either class 'A' or class 'B.' People v. Love, 310 Ill. 568, does not hold, as contended by the People, that the burden is upon the defendant to prove that the stocks in question were not class 'C' or class 'D' securities. We may be very suspicious that the securities in question were class 'B' securities, but lawgiver cannot be decided on surmise, conjecture or supposition. Before the burden was cast on the defendant to prove that the sale made by him was within any of the exemptions provided by paragraph 2 of section 37 of the Illinois Securities act, the People must first have made out a prima facie case proving the defendant's guilt as charged, beyond a reasonable doubt.

"It is not necessary in the state of this record for the court to decide whether class 'D' securities may be sold by the bona fide owner thereof for his own account, as under the exemption made for class 'B.'

"The evidence did not prove the guilt of the defendant as charged, beyond all reasonable doubt."

The introduction of the certificate of the secretary of state to the effect that section 9 of the act had not been complied with was no proof whatever, and there was no other evidence offered tending to show in what class the stock involved here belonged. If it belonged in either class "A" or class "B," compliance with section 9 was unnecessary. The burden was, therefore, upon the People to prove beyond a reasonable doubt that the Glader Corporation stock





belonged to either class "C" or class "B," as defined by the Securities Act.

The evidence in this case did not prove the guilt of defendant, Glader, as charged, beyond a reasonable doubt. The judgment of the Municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley and Scanlan, JJ., concur.

belonged to them about 1770, as shown by the

original map.

The village is now the site of the

of the village, which is now a small town.

The village of the village is now a small town.

It is now a small town.

It is now a small town.

It is now a small town.



36976

WILLIAM M. NOBILE,  
Appellee,

v.

H. G. MALNICK and H. MALNICK,  
doing business as Lakewood  
Developers Organization,  
Appellants.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

274 I.A. 667<sup>4</sup>

MR. PRESIDING JUSTICE SULLIVAN  
DELIVERED THE OPINION OF THE COURT.

By this appeal defendants H. G. Malnick and H. Malnick, doing business as Lakewood Developers Organization, seek to reverse a judgment in favor of plaintiff, William M. Nobile, for \$120 entered in the Municipal court June 18, 1933, on the verdict of a jury.

Plaintiff's statement of claim alleged that June 30, 1931, he entered into a written contract with defendants for the construction of a dwelling house at Edgerton, Wisconsin, whereby they agreed to build same in a good and workmanlike manner with "6 inch cedar posts, creosote painted, sunk in cement \*\*\*; tongue and groove fir siding, free of cracks and pitch; Heatolater face brick fire place inside; all material, labor, hardware furnished by the builder \*\*\* of good substantial materials;" that defendants did not comply with the contract in that they failed to creosote the cedar posts before setting them in the cement to plaintiff's damage of \$160; that they furnished and installed a cracked mantel in the fireplace to plaintiff's damage of \$18; that they failed to properly seal the siding, roof and walls adjacent to the chimney in a good and workmanlike manner to plaintiff's damage of \$18; and that although

1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

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THE UNIVERSITY OF CHICAGO PRESS

1. The business is a partnership between the undersigned and the undersigned, and the undersigned is a partner in the business.

The following is a list of the names of the persons who were present at the meeting of the Board of Directors of the United States National Bank, held on the 10th day of January, 1901, at New York City:

repeatedly requested to make suitable repairs to fulfill the terms of their contract defendants have refused to do so to plaintiff's damage of \$190. Defendants neither filed an affidavit of merits nor offered any evidence upon the trial.

Plaintiff's theory is that he had a right to recover for breach of the contract by defendants in failing to provide essential items of construction as specified, and by reason of defective materials furnished and poor workmanship employed on certain parts of the building, and that there was ample competent evidence to justify the verdict of the jury and the judgment of the court.

Defendants contend that damages due to the alleged defects were not proven upon the trial by competent evidence, and that the trial court erred in failing to give any instructions to the jury. To the contention of defendants that the trial court failed to instruct the jury it is sufficient answer to say that no instructions were either offered or suggested to the court by them, and inasmuch as the bill of exceptions fails to disclose any objection on the part of defendants to the failure of the court to instruct the jury they cannot be heard to urge that point here for the first time.

The salient facts as they appeared from the evidence are that the cedar posts were not painted with creosote; that the mantel was cracked when the building was turned over to plaintiff; that the siding, roof and walls adjoining the chimney were not properly sealed, thereby permitting the rain to enter; that, inasmuch as the lower portion of the building was fully enclosed, plaintiff did not discover the failure to creosote the cedar posts under the building until a few months after he took possession of same when he dug under the building to construct a storage room; that many complaints were made and defendants requested to remedy the defects in construction; that upon defendants' demand for the last \$37 due them on the contract for the erection of the building, plaintiff insisted that before he



repeatedly requested to make suitable repairs to the same  
of their contract defendants have returned as to as Plaintiff's  
amount of \$100. Defendants neither filed an affidavit of merit  
nor offered any evidence upon the trial.

Plaintiff's theory is that he had a right to recover for  
breach of the contract by defendants in failing to provide essential  
items of construction as specified, and by reason of defective  
workmanship furnished and work furnished contrary to certain parts  
of the building, and that there was ample competent evidence to  
justify the verdict of the jury and the judgment of the court.  
Defendants contend that damages are to the alleged breach

were not proven upon the trial by competent evidence, and that the  
trial court erred in failing to give any instructions to the jury.  
To the contention of defendants that the trial court failed to  
instruct the jury if the defendant answers to any kind of instructions  
were either offered or suggested to the court by them, and inasmuch  
as the bill of exceptions fails to disclose any objection on the  
part of defendants to the failure of the court to instruct the jury  
they cannot be heard in such case after the trial time.

The claims made as they appeared from the evidence are  
that the order books were not printed with accuracy; that the number  
was exceeded when the building was turned over to Plaintiff; that the  
building, roof and walls adjoining the building were not properly sealed,  
thereby permitting the rain to enter; that inasmuch as the lower  
portion of the building was built on a swampy place, Plaintiff did not discover  
the failure to enclose the order books under the building until a  
few months after he had possession of same when he saw water in  
building in connection with a swampy place; that when complaints were made  
and defendants requested to remedy the defects in construction; that  
upon defendants' demand for the loss of the building, Plaintiff insisted that before he  
let the erection of the building, Plaintiff insisted that before he

paid some defendants must agree in writing to make the necessary repairs and replacements; that they gave him such written agreement October 24, 1931, at which time he paid them the \$37; that painting with creosote about doubles the life of cedar posts; that to properly creosote the cedar posts the siding would have to be removed from the house, the house raised on jacks, most of the floor removed, the posts removed from the cement footings where they were imbedded, the footings removed and new ones put in their place, the posts reset in the footings after they were creosoted and the siding and floor replaced after the jacks were removed and the building lowered to the cedar post supports.

The evidence is undisputable that the building as turned over to plaintiff did not comply with the specifications of the contract and was defective in the respects heretofore set forth. Plaintiff never accepted it from defendant until they gave him the following written stipulation:

"The Lakewood Developers Organization agrees as per letter sent to the Boyon Lumber Company under date of October 24th, in the event stated defects in house owned by Mr. Nocile and erected by the Boyon Lumber Company exists and if not repaired, or replaced by the Boyon Lumber Company, the Lakewood Developers Organization agrees to do so.  
Lakewood Developers Organization,  
by H. Malnick."

Defendants refused to make good on both their original contract and supplemental agreement, but insist that plaintiff's damages were not proven with the exactitude and precision they assert the law demands in this character of case. An experienced contractor testified that it would take even more than the amount the jury saw fit to allow as damages to make the repairs and replacements necessary to have the building conform to the requirements of the contract. His testimony stands uncontradicted and it furnished a basis for the jurors, testing it by their own experience, to make a reasonable allowance of damages.





Defendants contend that the verdict was against the manifest weight of the evidence both as to their liability and the award of damages. The jury heard the witnesses testify and it was preeminently within its power to determine if they were worthy of belief. The trial judge also heard and saw the witnesses and approved of the verdict of the jury. In that state of the record this court will not disturb the verdict unless it is manifestly against the weight of the evidence which is not the case here. (Bradley v. Palmer, 193 Ill. 15.)

We are of the opinion that substantial justice has been done between the parties. The judgment of the Municipal court is affirmed.

JUDGMENT AFFIRMED.

Gridley and Scanlan, JJ., concur.



37083

AETNA LIFE INSURANCE CO.,  
a corporation,  
Appellee,

v.

MATTIE MARSH et al.

On appeal of MATTIE MARSH,  
Appellant.

APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

274 I.A. 668<sup>1</sup>

MR. PRESIDING JUSTICE SULLIVAN  
DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a decree of the Circuit court entered May 11, 1933, ordering the payment to Lucy Smith of \$994.84, the proceeds of a life insurance policy. Complainant, Aetna Life Insurance Company, filed a bill of interpleader alleging that Mattie Marsh and Lucy Smith, defendants, were claimants to \$1,000 insurance on the life of Gus Marsh, who died January 3, 1933, and that it desired to bring the money into court to be paid to the party determined by the court to be rightfully entitled thereto. Both defendants filed answers asserting their respective claims, and the fund was deposited with the clerk of the court.

From the undisputed evidence it appeared that August 27, 1926, the decedent, Gus Marsh, was a member of Swift & Company Employees' Benefit Association (hereinafter referred to as the association) and as such made an application for a \$1,000 group life insurance policy, which shortly thereafter was issued to him by complainant; that in his application for such policy Lucy Pickett (Lucy Smith), his then mistress, was named



1950-1951

2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349 2350 2351 2352 2353 2354 2355 2356 2357 2358 2359 2360 2361 2362 2363 2364 2365 2366 2367 2368 2369 2370 2371 2372 2373 2374 2375 2376 2377 2378 2379 2380 2381 2382 2383 2384 2385 2386 2387 2388 2389 2390 2391 2392 2393 2394 2395 2396 2397 2398 2399 2400 2401 2402 2403 2404 2405 2406 2407 2408 2409 2410 2411 2412 2413 2414 2415 2416 2417 2418 2419 2420 2421 2422 2423 2424 2425 2426 2427 2428 2429 2430 2431 2432 2433 2434 2435 2436 2437 2438 2439 2440 2441 2442 2443 2444 2445 2446 2447 2448 2449 2450 2451 2452 2453 2454 2455 2456 2457 2458 2459 2460 2461 2462 2463 2464 2465 2466 2467 2468 2469 2470 2471 2472 2473 2474 2475 2476 2477 2478 2479 2480 2481 2482 2483 2484 2485 2486 2487 2488 2489 2490 2491 2492 2493 2494 2495 2496 2497 2498 2499 2500 2501 2502 2503 2504 2505 2506 2507 2508 2509 2510 2511 2512 2513 2514 2515 2516 2517 2518 2519 2520 2521 2522 2523 2524 2525 2526 2527 2528 2529 2530 2531 2532 2533 2534 2535 2536 2537 2538 2539 2540 2541 2542 2543 2544 2545 2546 2547 2548 2549 2550 2551 2552 2553 2554 2555 2556 2557 2558 2559 2560 2561 2562 2563 2564 2565 2566 2567 2568 2569 2570 2571 2572 2573 2574 2575 2576 2577 2578 2579 2580 2581 2582 2583 2584 2585 2586 2587 2588 2589 2590 2591 2592 2593 2594 2595 2596 2597 2598 2599 2600 2601 2602 2603 2604 2605 2606 2607 2608 2609 2610 2611 2612 2613 2614 2615 2616 2617 2618 2619 2620 2621 2622 2623 2624 2625 2626 2627 2628 2629 2630 2631 2632 2633 2634 2635 2636 2637 2638 2639 2640 2641 2642 2643 2644 2645 2646 2647 2648 2649 2650 2651 2652 2653 2654 2655 2656 2657 2658 2659 2660 2661 2662 2663 2664 2665 2666 2667 2668 2669 2670 2671 2672 2673 2674 2675 2676 2677 2678 2679 2680 2681 2682 2683 2684 2685 2686 2687 2688 2689 2690 2691 2692 2693 2694 2695 2696 2697 2698 2699 2700 2701 2702 2703 2704 2705 2706 2707 2708 2709 2710 2711 2712 2713 2714 2715 2716 2717 2718 2719 2720 2721 2722 2723 2724 2725 2726 2727 2728 2729 2730 2731 2732 2733 2734 2735 2736 2737 2738 2739 2740 2741 2742 2743 2744 2745 2746 2747 2748 2749 2750 2751 2752 2753 2754 2755 2756 2757 2758 2759 2760 2761 2762 2763 2764 2765 2766 2767 2768 2769 2770 2771 2772 2773 2774 2775 2776 2777 2778 2779 2780 2781 2782 2783 2784 2785 2786 2787 2788 2789 2790 2791 2792 2793 2794 2795 2796 2797 2798 2799 2800 2801 2802 2803 2804 2805 2806 2807 2808 2809 2810 2811 2812 2813 2814 2815 2816 2817 2818

• 1964-1965

THE UNIVERSITY OF CHICAGO PRESS

This appeal seems to present a review of the Circuit's  
 court reported on July 11, 1935, wherein the opinion is long with  
 of 1934-35, the purpose of a life insurance policy. Insurance  
 and, under the Insurance Company, filed a bill of interpleader  
 alleging that John Smith and Mary Smith, defendants, were  
 claimants to \$10,000 insurance on the life of John Smith, who  
 died January 24, 1934, and that it desired to bring the money  
 into court to be paid to the party determined by the court to be  
 rightfully entitled thereto. Both defendants filed answers  
 asserting their respective claims and the fact was disputed  
 who was the owner of the money.

[illegible]

beneficiary under the designation "Lucy Marsh, wife," but that no beneficiary was named in the original certificate or policy of insurance issued to him pursuant to such application; that March 29, 1928, Gus Marsh applied for an additional \$1,000 insurance under the terms of the same group insurance contract between the association and complainant; that Lucy Pickett, who was living with him as his "wife" at the time he made application for the first policy, had separated from him in February, 1927, and married one Dan Smith March 16, 1927; that Mattie Marsh was married to Gus Marsh May 4, 1928, and lived with him as his wife up to the time of his death; and that the application for the additional \$1,000 policy when presented to the insured for his signature contained substantially the following printed and typewritten language:

"Swift & Company  
E.B.A.

Aetna Life Insurance Company  
Application for Group Life  
Insurance.

G-6587

| Name.            | G. Marsh | Weekly Premium                 | Date    | Amount of Group Insurance. |
|------------------|----------|--------------------------------|---------|----------------------------|
|                  |          | 15 1st Group                   | 3-27-26 | \$1000                     |
|                  |          | 15 Additional A/C of 2nd Group | 3-29-28 | 1000                       |
| E.B.A. Cert. No. | 566359   |                                |         |                            |

| Name of Beneficiary | First Lucy | Last Marsh | Relationship of Beneficiary. | Wife. |
|---------------------|------------|------------|------------------------------|-------|
|---------------------|------------|------------|------------------------------|-------|

I hereby apply for additional group life insurance in the amount of \$1,000, subject to and in accordance with the terms of Group Life Insurance Policy No. 2380, and riders, issued to Swift & Company Employees Benefit Association by the Aetna Life Insurance Company, Hartford, Connecticut, and I agree to take and hereby make application for such additional insurance to which I may hereafter, from time to time, be entitled under said plan.

Gus Marsh  
Signature of Applicant."

It further appeared that Marsh, before signing this second application, scratched out with ink the word "Lucy" and wrote in the word "Mattie," and that a policy for the additional \$1,000 insurance was issued to him bearing the same date as the application with Mattie





Marsh named as beneficiary on the face of the certificate.

The group life insurance policy contract between the association and complainant contained the following among other provisions:

"This policy, the application of the association and the individual applications, if any, of the members insured, constitute the entire contract between the parties hereto."

"any member insured hereunder may upon written request signed by the member designate a new beneficiary as often as desired; such designation to become effective only upon receipt of same at the Home Office of the Company."

The certificates of insurance issued to the decedent under the group policy or contract contained this provision:

"In the event of the death of any insured member at any time or place, from any cause whatsoever, the amount of insurance then in force upon his life will be paid to the last duly designated beneficiary or beneficiaries. The beneficiary may be changed at any time under and subject to the terms of the policy."

It also appeared that complainant paid to Mattie Marsh, wife of decedent, the \$1,000 insurance covered by the second certificate, and that the basis of this action is the \$1,000 covered by the first certificate which the chancellor ordered paid to Lucy Smith.

Defendant Mattie Marsh contends that when the insured made his application for the additional \$1,000 insurance he definitely intended to make her the beneficiary of the original \$1,000 as well as the additional \$1,000 insurance; that both amounts as well as the name of Lucy Marsh, beneficiary, appeared on the application card presented to him for the additional insurance, and that before signing same he struck out the name "Lucy" and wrote in the name "Mattie"; that with the name of Lucy Marsh stricken out and the amount of insurance of which she was beneficiary remaining in she was thereby intentionally eliminated as a beneficiary; that under the terms of the group policy the insured could change beneficiaries as he pleased, simply by filing a written request with the company; that his application for

March named as beneficiary on the face of the certificate.  
The group life insurance policy contract between the  
association and complainant contained the following among other

provisions:

"This policy, the application of the association and  
the individual certificate, is one of the master policy,  
constituting the entire contract between the parties herein."

"Any member insured hereunder may upon written request  
assigned by the member beneficiary a new beneficiary as when an  
existing policy designation is deemed effective only upon receipt  
of same at the home office of the company."

The certificate of insurance issued to the deceased

under the group policy in question contained this provision:

"In the event of the death of any insured member at any  
time or place, from any cause whatsoever, the amount of insurance  
then in force upon his life will be paid to the first duly designated  
beneficiary or beneficiaries. The beneficiary may be changed  
at any time and subject to the terms of the policy."

It also appeared that complainant paid to Mattie March,

wife of deceased, the \$1,000 insurance covered by the second certificate,  
and that the balance of this action is the \$1,000 covered by  
the first certificate which the checkbook ordered paid to Lucy

March.

Complainant Mattie March contends that when the insured

made his application for the additional \$1,000 insurance he  
definitely intended to make her the beneficiary of the original  
\$1,000 as well as the additional \$1,000 insurance; that both  
amounts as well as the name of Lucy March, beneficiary, appeared  
on the application and presented to him for the additional  
insurance, and that before signing same he handed out the name  
"Lucy" and wrote in the name "Mattie"; that with the name of Lucy  
March written out and the amount of insurance of which she was  
beneficiary remaining in one was properly informally witnessed  
as a beneficiary; that under the terms of the group policy the  
insured could change beneficiaries as he pleased, simply by filing  
a written request with the company; that his application for



additional insurance constituted such written request as to the original policy; and that inasmuch as the application was specifically made a part of the contract of insurance it was intended to and did cover all of the insurance which he carried with complainant under its group policy contract with the association.

Defendant Lucy Smith's theory is that she was made beneficiary of the original \$1,000 certificate before Mattie Marsh became decedent's wife; that the application for and the issuance of the certificate for \$1,000 additional insurance in no way affected her rights; that the fact that Mattie Marsh was the last named beneficiary in point of time did not cancel the original declaration of beneficiary, concerning itself with the second policy only; that the provisions of the insurance contract specified that a member might "upon written request signed by the member designate a new beneficiary;" that it was necessary to order and direct the company formally, in writing, to change the beneficiary before such change could be effected; that this was not done by decedent; and that therefore the first application designating Lucy Marsh as beneficiary was still in full force and effect at the time of insured's death.

There is nothing in the record to indicate that when decedent signed the application for additional insurance he had in contemplation anything except the additional insurance. It is true that the application form filled out as heretofore set forth, before it was presented to him for his signature, carried a memorandum of the original group policy showing the amount of same, the date applied for and the amount of the weekly premium. However, in the absence of evidence to the contrary it is a reasonable inference that the only purpose of complainant in listing the original insurance on this second application was for





its own convenience in having all of decedent's insurance shown on one record. When complainant prepared this application for the signature of the insured it unquestionably copied "Lucy Marsh, wife," as beneficiary from his application for the first group policy, naturally assuming, having received no request theretofore to change his beneficiary, that Lucy was his wife and that he would desire to name her beneficiary of his second policy also.

It is earnestly contended that the insured intended by his act in changing the names to eliminate Lucy Smith entirely and make Mattie Marsh the beneficiary of both policies. The difficulty of this position is that both in making the change and affixing his signature to the application he was dealing only with the second policy. Complainant never considered the second application as affecting the first policy. Although when issued the policies bore the same number, in our opinion, they were separate and distinct contracts. To call the conduct of decedent in changing the name of the beneficiary on his second application a written request on complainant to change the beneficiary of his first policy would be by a forced construction to make it something which it does not purport and was not intended to be, and we can not recognize it as such. (Highland v. Highland, 109 Ill. 366.) To fail to see any more legal significance in his changing the name on this application for additional insurance than if the space thereon for the name of the beneficiary had been blank and he had written therein the name of Mattie Marsh.

It may be conceded, under all the facts and circumstances, that the decedent had good reason to supplant Lucy Smith as his beneficiary, and he may, in fact, have intended to do so, but unless that intention was manifested in the manner prescribed by the terms of the contract it was of no avail to accomplish his object. The contract of insurance provided a simple method of

The first document is dated at "London" a document which  
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 my opinion as to the date. (HAROLD J. HARRIS, 11th Jan.)  
 to call it one and the same legal document in his changing the  
 name in this document for the first document is in the  
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 he had written therein the name of Harold Harris.  
 it may be concluded, under all the facts and circumstances,  
 that the document had been signed by Harold Harris and that  
 the document, and as such, is dated at London in the year 1941  
 which, dated 11th January, 1941, is dated at London and dated at  
 the name of the first party is dated at London and dated at  
 which. The document of second party is dated at London and dated at



changing beneficiaries. All that was required was the receipt by the insurer of a written request from the insured designating a new beneficiary. No such request was ever received by the complainant and the substitution of the name "Mattie" for the name "Lucy" in the second application, in our opinion, cannot by any stretch of reasoning be held to effect a change of beneficiaries by the insured under the first group policy. His act was not sufficient in law to accomplish the purpose even though we assume it was his purpose to make such change.

It is strenuously urged that because Mattie Marsh was decedent's wife at the time of his death and Lucy Smith was his mistress at the time he applied for the first thousand dollar insurance, and designated her as "Lucy Marsh, wife," in his application, public policy will prohibit her from reaping any benefit under the policy. The same argument might be advanced with almost equal force as to Mattie Marsh. At the time insured signed the application for the second policy and struck out the name "Lucy" and designated "Mattie Marsh, wife," as his beneficiary, she was not his wife either. Counsel for Mattie Marsh exonerate Lucy for her relations with decedent and throughout their brief and argument declare and reiterate the superior position of Mattie as the lawful wife of the insured at the time of his second application, but an examination of the record discloses that Mattie was not decedent's wife at the time he signed the second application and did not marry him until the following May.

It is not urged that Marsh actually made or that complainant received at its home office a written request to change the beneficiary of his first policy in compliance with its provisions, but it is contended that his act in substituting the name "Mattie" for "Lucy" in his application for additional insur-

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once disclosed his intention to make such change. Even though that was his intention and he meant to so disclose it by his conduct, nothing that he did, in our opinion, had the effect of designating a new beneficiary under the first policy. The provisions of his contract of insurance set forth the plan by which the reserved right to change the beneficiary might be made effective. The general rule supported by the great weight of authority is that where the policy prescribes and regulates the method of changing beneficiaries any attempt or any intent to make such change in any other manner is ineffectual. (Metropolitan Life Ins. Co. v. Brown, 223 Ky. 211.) The right to change the beneficiary, while permitted by the policy, is limited by its terms, a substantial compliance with which cannot be dispensed with. Freund v. Freund, 218 Ill. 139, states the doctrine on this subject which, in its application to this case, inhibits our holding that any change of beneficiary of the first policy was effected by decedent's acts in connection with the application for the second policy. (Begley v. Miller, 137 Ill. App. 272.)

It appeared that Lucy Smith never had the first policy in her possession and did not even know of its existence. The fact of the policy never having been delivered to her, but remaining in the possession of Marsh, detracts nothing from the effect of his direction for the payment of its proceeds to her. Her claim of right to the fund does not rest upon contract, but upon a direction for its payment to her. (Highland v. Highland, supra.) We are constrained to hold that there was ample justification for the court's conclusion that Lucy Smith was the rightful beneficiary under the first policy.

The motion of defendant Lucy Smith (appellee) heretofore



even disclosed his intention to make such change, even though that was his intention and he meant to do so. It is by his conduct, nothing that he did, in our opinion, had the effect of establishing a new beneficiary under the trust policy. The provisions of his contract of insurance set forth the plan by which the reserved right to change the beneficiary might be made effective. The general rule expressed by the above words of authority is that where the policy provides and requires the insured to designate beneficiaries by filing an assignment of interest, to make such change in any other manner is ineffectual. (*Wright v. Union Life Ins. Co., 100 N. D. 111.*) The right to change the beneficiary, while governed by the policy, is limited by the terms, a restricted assignment with which cannot be assigned. (*Wright v. Union Life Ins. Co., 100 N. D. 111.*) Where the question is raised as to the validity of the assignment, the insured's right to change of beneficiary of the trust policy was affected by the insured's act in connection with the application for the second policy. (*Wright v. Union Life Ins. Co., 100 N. D. 111.*) It appears that both policies were in force at the time of the assignment and did not even know of its existence. The fact of the policy never having been delivered to her, but remaining in the possession of her husband, although nothing known the effect of his direction for the payment of the proceeds to her. Her claim of assignment is not valid and does not constitute a change of beneficiary for the purpose to her. (*Wright v. Union Life Ins. Co., 100 N. D. 111.*) We are convinced to hold that there was ample justification for the court's conclusion that both policies were the subject of beneficiary under the trust policy.

The action of defendant may with (appellate) be sustained

made to dismiss the appeal of Mattie Marsh and to assess statutory damages against her, which was reserved to the hearing, is denied.

For the reasons indicated herein the decree of the Circuit court is affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

made to eliminate the spread of disease and to ensure  
 necessary measures against it, which are necessary to the

health of the people.

The Government has taken the necessary steps to

eliminate the disease.

1918

1918 and 1919, 1920 and 1921



37095

ROBERT C. FARRELL and  
THOMAS R. CONDON,  
Appellants,

v.

IRVEN H. WILSEY,  
Appellee.

163 7  
APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

274 I.A. 668<sup>2</sup>

MR. PRESIDING JUSTICE SULLIVAN  
DELIVERED THE OPINION OF THE COURT.

This was an action in assumpsit brought by plaintiffs, Robert C. Farrell and Thomas R. Condon, against Irvan H. Wilsey, defendant, to recover the price of a boat. Judgment was entered by the court on the verdict of the jury finding the issues for defendant. This appeal followed. The declaration consists of the consolidated counts and one special count.

The special count alleged that in September, 1929, plaintiffs sold to defendant a certain motor boat of the cruiser type for \$9,250, which was the price defendant agreed to pay; and that plaintiffs delivered such motor boat, together with its appurtenant equipment and a bill of sale therefor, to defendant, who failed and refused to pay any part of said purchase price. To plaintiffs' declaration was attached an affidavit of claim verified by one of the plaintiffs and stating that their demand was for the agreed purchase price of \$9,250 for the boat; that no part of same had been paid by defendant; and that there was due plaintiffs from defendant, after allowing him all just credits, deductions and set-offs, \$9,250.

Defendant filed a plea of the general issue and a special plea of payment. With his pleas he filed an affidavit



of merits stating that he received the boat and also a bill of sale; that he paid the full consideration therefor; that the consideration was not the alleged \$9,250; that no definite sum was agreed upon and that the market value of the boat at the time of its "transfer" was less than \$6,000; that the consideration for the "transfer" of the boat was work done and to be done by defendant and his organization, and the use of his office in reference to perfecting certain models and other work in connection with such models; that defendant performed all the work he agreed to do and kept his agreement; that such work done by defendant and his organization and the use of his office was worth \$12,000, which amount was greatly in excess of the market value of the boat and its alleged price; and that there is nothing due plaintiffs, or either of them, from defendant.

Plaintiffs both testified substantially that in September, 1929, defendant stated to each of them that he would purchase their boat for \$9,250; that September 27, 1929, the boat and an accompanying bill of sale were delivered to defendant; that thereafter, from time to time, they demanded payment for the boat and that he failed and refused to comply with such demands, protesting on at least one occasion his then inability to pay.

Defendant testified in effect that he at no time agreed to pay plaintiffs \$9,250 for the boat; that he, an inventor by profession, had entered into certain license agreements with the Little Equipment Company, a corporation, in which plaintiffs were interested, for the manufacture by it on a royalty basis of four devices invented by defendant; that the Little Equipment Company, as consideration for such license agreements, agreed to and did pay defendant \$20,000 as advance royalties; that, subsequent to the execution of the license agreements, defendant advised



of Martin stating that he received the book and also a bill of \$10.00; that he paid the bill immediately; that the consideration was not the alleged \$7,500; that no definite sum was agreed upon and that the market value of the book at the time of its "transfer" was less than \$6,000; that the consideration for the "transfer" of the book was work done and to be done by defendant and his organization, and the use of his office in reference to performing certain work; and again that in connection with such matters that defendant performed all the work he agreed to do and kept his agreement; that such work done by defendant and his organization and the use of his office was worth \$12,000, which amount was exactly in excess of the market value of the book and the alleged price; and that there is nothing like falsification or other of whom, from defendant.

[illegible]

Belmont testified in effect that at no time agreed to pay plaintiff \$1,250 for the book, as demanded by

plaintiff Condon that the Tuttle Equipment Company was not properly equipped or engineered to carry the inventions to production; that Condon proposed to defendant that plaintiffs would give him the boat as payment if he would carry the inventions through to production and "I stated that for the boat I would proceed to work and use my office and help for the necessary period, which I estimated to be about six months, to carry these things into good production." Defendant's other two witnesses testified to substantially the same effect.

Plaintiffs contend that by defendant's special plea of payment and his affidavit of merits in support of same, he admits the purchase of the boat and is limited in his defense to show payment and that the burden of proof was on him on that issue; that, inasmuch as he asserted in his affidavit of merits that the payment was made by the rendition of services "in perfecting certain models and other work in connection with such models," the trial court erred in admitting evidence as to the service claimed to have been performed other than as stated in his affidavit of merits; that the court erred in giving to the jury certain repugnant instructions; and that, even had the pleadings and affidavit of merits permitted a showing by defendant that the consideration for the boat was his services to the extent necessary to permit the Tuttle Equipment Company to carry the inventions to a complete production standpoint, the proof did not sustain such a defense.

Defendant's theory is that instead of the work and services of defendant being the consideration for the boat, the boat was the consideration for the work and services, and that defendant did not purchase the boat from plaintiffs.

Defendant urges that his special plea of payment was filed simply as a precaution, and his counsel states on page 6 of defendant's

[illegible]



brief that this court should disregard it as no proof was offered under it. Defendant then insists that his affidavit of merits refutes the idea of the sale of the boat to him and contains no assertion of payment for it by him. It is sufficient answer to this contention to quote from his affidavit of merits as follows:

"Irvon H. Wilsey, being first duly sworn, on oath deposes and says that he is the defendant in the above entitled cause; that he received the said motor boat in said declaration mentioned and also received a bill of sale for the same; that he paid the full consideration therefor; \* \* \*."

That defendant's insistence here and on the trial that instead of his work being the consideration for the boat, the boat was the consideration for his work, was and is an afterthought, is demonstrated by the following from his affidavit of merits: "that the consideration for the transfer of the boat was work done and to be done by this affiant, etc."

It is obvious to us and the plain language of the affidavit of merits supports our conclusion, that when the affidavit of merits was filed it was defendant's purpose to and he did admit the purchase and delivery of the boat, but disputed the price and the method and character of payment.

His affidavit of merits states "that the consideration for said boat was not the alleged sum of \$9,250; that no definite sum was fixed; that the market value of said boat at the time of the transfer was less than \$6,000." An inspection of the affidavit of merits demonstrates conclusively that it set forth the defense of payment and only that defense.

Plaintiffs made out a prima facie case by presenting evidence that defendant agreed and promised to pay them \$9,250 cash for the boat. The burden then devolved upon defendant under his affidavit of merits to show, if he could, that the amount and character of the consideration to be paid by him were different





than plaintiffs claimed and that he made payment accordingly.

The purpose of requiring the affidavit of merits to set out the nature of the defense relied upon is to give the plaintiffs notice of the real defense presented, to limit the issues to be tried to the defense set out in the affidavit and to do away with sham pleas and vexatious delays. All defenses, the nature of which are not set up in the affidavit, are considered waived and are not available on the trial. (Kadiach v. Fortune Bros. Brewing Co., 163 Ill. App. 276; Cooper v. Anderson, 246 Ill. App. 1.)

McGovern v. City of Chicago, 202 Ill. App. 139, was an action in assumpsit to recover the contract price for street repairs. In that case, in response to plaintiff's declaration laid in two special counts and the common counts, accompanied by an affidavit of claim, the defendant filed a plea of the general issue supported by an affidavit of merits asserting payment as its defense, and thereafter filed several special pleas, none of which alleged payment, and this court in holding that the defendant was restricted to the defense set up in its affidavit of merits, used the following language, at pp. 148, 149-50:

"By section 55 of chapter 110, Rev. St. (J. & A. par. 3592), and the decisions of our courts of review construing this section, a defendant is restricted to the defense set up in his affidavit of meritorious defense. The defense in the city's affidavit of merits was that of payment, and if objections had been made upon the trial to all evidence tendered in defense other than that of payment, it would have been the duty of the court to have sustained such objections. Notwithstanding all the pleadings in the record, the only defense available to defendant was the one of payment made in its affidavit of merits. \* \* \*

"In Kadiach v. Fortune Bros. Brewing Co., 163 Ill. App. 276, the court says:

"By section 55 of the Practice Act (J. & A. par. 3592), it is provided that when the plaintiff shall file with his declaration an affidavit of claim, the defendant, in order to prevent a judgment as by default, shall file with his plea an affidavit, 'stating that he verily believes the defendant has a good defense to said suit upon the merits to the whole or portion of the plaintiff's demand and specifying the nature of such defense.'





and if a portion, specifying the amount.'  
 " \* \* \* The part of section 55 above quoted has been in force for many years with the exception of the words in italics. \* \* \* Prior to the addition of these words, it was held that an affidavit, stating that the defendant had a good defense to the suit upon the merits, was sufficient to entitle the defendant to prove any defense he had that was well pleaded. The addition of the words 'and specify the nature of such defense' was not inadvertently made. The purpose of requiring the affidavit of merits to set out the nature of the defense relied on was to give the plaintiff notice of the real defense to be presented and to limit the issues to be tried to the defense set out in the affidavit. All defenses, the nature of which are not set up in the affidavit, are considered waived and are unavailable on the trial."

McPherson v. Board of Education, 235 Ill. App. 426, cited by defendant's counsel, is not applicable to the situation presented here inasmuch as plaintiffs did offer evidence in support of the material allegations of their special count. While this court in the Deeper case, supra, definitely refused to accept or follow the interpretation of section 55 of the Practice Act, as announced in the McPherson case, even the latter case recognizes the principle that a defendant is limited to the defense set out in his affidavit of merits.

Inasmuch as the affidavit of merits in this cause expressly denied that there was any specific amount agreed upon between the parties as the purchase price of the boat, the burden was upon plaintiffs to prove by a preponderance of the evidence the agreed price, if any.

Whether the sale price of the boat was fixed by agreement of the parties or whether defendant's obligation was to pay the market value of the boat on the day of its delivery to him, defendant having interposed the defense of payment, the burden was on him to show payment. The rule is well established that payment must be made in money unless there is an express stipulation for payment in some other medium. In the case at bar defendant asserts that the parties agreed that he was to pay for the boat in services and the burden is







on him to prove such agreement. The burden is likewise upon him to prove services of the kind and character stated in his affidavit, sufficient in scope and value to pay for the boat, either at its agreed price, as contended by plaintiffs, if same is sufficiently shown by the evidence, or at its fair market value, if the evidence shows that such market value was the price contemplated in the transaction between the parties.

We agree with plaintiffs' contention that instructions were given to the jury on the question of the burden of proof that were not only conflicting but were repugnant, and could have no other effect than to mislead and confuse the jury. At the request of plaintiffs the trial court instructed the jury that the burden of proof was upon defendant to show payment; and on behalf of defendant that in order to entitle plaintiffs to recover they must prove their case by the preponderance or greater weight of the evidence. The latter instruction entirely overlooked the fact that all of plaintiffs' case was admitted by the defense of payment asserted in the special plea of payment and affidavit of merits, except the price of the boat, and the error in giving it was prejudicial.

Neither the ingenuity displayed in framing the affidavit of merits nor plausible argument can alter the fact that plaintiffs owned the boat; that the affidavit of merits admits that defendant purchased it from them; and that the only defense asserted under the affidavit of merits was payment, which, under the clearest principles of justice, he was bound to prove.

Other points have been urged and while we have considered all of them, in the view we take of the case it is unnecessary to discuss them further. As the case will in all likelihood be tried again, we refrain from expressing any opinion as to the facts or

on him to prove such agreement. The burden is likewise upon him to prove contents of the bill and character stated in his affidavit, sufficient in scope and value to pay for the bond, either as the agreed price, as contended by plaintiff, or as the value actually shown by the evidence, or as the fair market value. If the evidence shows that such market value was the price contained in the instrument between the parties.

It is also with plaintiff's contention that instructions were given to the jury on the question of the burden of proof that were not only conflicting but were erroneous, and could have no other effect than to mislead and confuse the jury. As the request of plaintiff's last trial court instructed the jury that the burden of proof was upon defendant to show payment; and on behalf of defendant that in order to entitle plaintiff to recover they must prove that, also by the preponderance of greater weight of the evidence. The latter instruction entirely overlooked the fact that all of plaintiff's case was admitted by the defense of payment asserted in the special plea of payment and affidavit of merit, except the price of the bond, and the error in giving it was prejudicial.

Neither the allegedly disproved in finding the affidavit of merit nor plausible argument can alter the fact that plaintiff owned the bond; that the affidavit of merit admits that defendant purchased it from them; and that the only defense asserted under the affidavit of merit was payment, which, under the evidence, plaintiff of justice, he was bound to prove.

Other points have been urged and while we have considered all of them, in the view we take of the case it is unnecessary to discuss them further. In the case will be all dismissed as tried against, we retain from expressing any opinion as to the facts.

weight of the evidence.

For the reasons indicated the judgment of the Circuit court will be reversed and the cause remanded.

REVERSED AND REMANDED.

Griddle and Senelan, JJ., concur.



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37104

ARTHUR BELTASON,  
Appellee,

v.

A. C. CROHERITE,  
Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

274 I.A. 668<sup>3</sup>

MR. PRESIDING JUSTICE SULLIVAN  
DELIVERED THE OPINION OF THE COURT.

May 25, 1933, plaintiff secured a judgment by confession for \$927.50 against defendant on his promissory note. June 13, 1933, defendant filed his verified petition to vacate the judgment and August 7, 1933, after leave granted, filed an amended petition for the same purpose. August 10, 1933, his motion to vacate the judgment was denied. This appeal seeks to reverse the order overruling defendant's motion to vacate the judgment by confession.

The statement of claim and cognovit are in the usual form. The note for \$904.26 dated March 13, 1933, payable forty-five days after date, was signed and indorsed by defendant and contained a warrant to confess judgment. The judgment for \$927.50 included interest and attorney's fees of \$112.92.

The material allegations of the amended petition to vacate the judgment, pertinent to the determination of the issues presented on this appeal, are that defendant was the assured under certain policies of insurance upon his life issued by the Union Central Life Insurance Company (hereinafter referred to as the Union Company) aggregating \$49,638; that D. T. Punch and J. C. Punch, agents of the Columbian National Life Insurance Company (hereinafter referred to as the





Columbian Company) solicited defendant to subscribe for life insurance with the Columbian Company aggregating \$25,000, falsely representing to him that his Union Company policies had a cash surrender value of \$6,000; that they also falsely represented to him that the Union Company was in a weak financial condition, and advised that he should realize what he could on his policies with that company before it crashed, as did the Illinois Life Insurance Company; that, relying upon these false representations, defendant signed the application for the Columbian policies and submitted to a medical examination; that, thereafter, March 13, 1933, J. C. Funch presented policies for \$25,000 of the Columbian Company to defendant, who advised Funch that the insurance moratorium which had been declared by the state superintendent of Insurance of Illinois precluded him from cancelling his Union Company policies and securing their cash surrender value, and that he did not care to obligate himself to pay \$804.26 premium on the new policies unless he could realize his money on the Union Company policies; that, thereupon, Funch entered into a written agreement with him which provided that if he accepted delivery of the Columbian Company policies and executed the note in question in payment of the premiums, notwithstanding its terms, the note would not be payable unless and until defendant actually received the cash surrender value of his Union Company policies; and that when defendant discovered that the cash surrender value of the Union Company policies was only about \$3,000, and that the Union Company was in sound financial condition, contrary to the representations of the Funches, he rescinded his contract for the insurance and cancelled the Columbian policies.

Defendant contends that the allegations of his petition are sufficient to show that plaintiff, the assignee





of the note upon which judgment was confessed, was not a holder in due course and that as against such a holder the amended petition to vacate set forth the following defenses that should completely bar the claim on the note, viz., that the note was procured by fraudulent representations made in the course of the negotiations for the Columbian Company policies; that the consideration for the note wholly failed; and that the note was not due and payable at the time the judgment was confessed because of the agreement between J. C. Punch and defendant as to the time of payment. Defendant contends further that under sections 59 and 55 of the Negotiable Instruments Act the burden is upon plaintiff to prove that he is a holder in due course, because the title of the Punches who negotiated the note to plaintiff is shown to be defective, inasmuch as the note was procured by fraud and was negotiated in breach of faith and under circumstances amounting to fraud.

Plaintiff's theory is that the note was not secured by fraud; that there was no failure of consideration; that it was due and payable at the time of the entry of the judgment; that the petition does not allege a good defense, even against one who was not a holder in due course; that although it was incumbent upon defendant to allege positively facts to show that plaintiff was not a holder in due course, his allegations in that regard were insufficient as being upon information and belief or mere conclusions; that in the absence of proper positive allegations plaintiff must be deemed to be <sup>a</sup> holder in due course; and that there are no such allegations of fraud in procuring the execution of the note as would cast the burden upon plaintiff of proving that he or some person under whom he claims acquired the title as a holder in due course as provided in section 59 of the Negotiable Instruments Act.

That portion of defendant's petition in which he



of the wife and child... was not a matter  
in the course and that as against such a holder the standard  
position to vacate not form the following between that should  
completely bar the claim on the note, viz., that the note was  
procured by fraudulent representations made in the course of  
the negotiations for the loan... viz., that the note was  
procured for the note wholly false; and that the note was  
not due and payable at the time the judgment was rendered  
because of the agreement between L. & C. which was delivered as  
to the time of payment. Defendant contends further that when  
section 27 and 28 of the Negotiable Instruments Act are applied  
to when plaintiff is given that in a holder in due course,  
because the date of the instrument was negotiated the note is  
plaintiff is shown to be defective, inasmuch as the note was  
procured by fraud and was introduced in breach of faith and  
other circumstances amounting to fraud.

Plaintiff's theory is that the note was not running  
by law; that there was no failure of consideration; that it  
was due and payable at the time of the entry of the judgment;  
that the holder does not allege a good defense, even against  
one who was not a holder in due course; that although it was  
introduced upon defendant in slight positive facts in that  
that plaintiff was not a holder in due course, his allegations  
as that regard were insufficient as being upon information and  
belief or mere conclusory that in the absence of proof  
negative allegations plaintiff must be deemed to be a holder in  
due course; and that there are no such allegations of fraud in  
procuring the execution of the note as would entitle the holder  
to a judgment of paying that he is now given when the  
holder acquired the title as a holder in due course as provided  
in section 27 of the Negotiable Instruments Act.

That position of defendant's position is that in

sought to allege that plaintiff was not a holder in due course is as follows:

"That notwithstanding the agreement of the said J. C. Funch with this affiant that the note should not be payable until this affiant should receive the cash surrender value of his Union Policies and in breach of faith with this affiant, as this affiant is informed and believes, the said D. F. Funch and J. C. Funch transferred and negotiated said note but without endorsement to the plaintiff herein; that this affiant is informed and believes and upon such information and belief alleges the fact to be that the plaintiff herein acquired the said note more than 45 days after March 13, 1935, and with knowledge that the said note had been procured by fraud and was transferred in violation of an agreement with this affiant; that the plaintiff is not a holder in due course of the said note and was not at the time of the entry of the judgment herein upon said note."

It will be noted that every one of these allegations is on information and belief except the last, and the allegation that "plaintiff is not a holder in due course of said note" is a mere conclusion of law. It is impossible to determine from it which of the conditions specified in the Negotiable Instruments Act constituting a holder in due course have not been complied with. (Rogers v. Horton, 95 N. Y. Supp. 49.)

If it were a necessary prerequisite to the statement of a meritorious defense in this cause that defendant make positive allegations of fact showing that plaintiff was not a holder in due course, we would be compelled to hold that the allegations of his amended petition to vacate the judgment were insufficient. We are not, however, with the question as to whether, since the verified petition contained such matters as would constitute, if established, a prima facie showing of a defective title in the Funches, who negotiated the note to plaintiff, it was necessary to allege at all that plaintiff was not a holder in due course.

Section 59 of the Negotiable Instruments Act, Cahill's Illinois Rev. St., ch. 98, par. 79, provides:

"Every holder is deemed prima facie to be a holder in due course, but when it (is) shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. \* \* \*







Section 55 of the act, Cahill's Illinois Rev. St., ch. 98, par. 76, defines when the title is defective:

"The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

The matters alleged in the petition, if established, would clearly show that defendant was a victim of the fraud and deceit of the Panches. By their false representation that the Union Company was in a weak financial condition, (when in fact it was sound) upon which representation defendant relied, they inculcated fear in the mind of defendant that that company would fail as had the Illinois Life Insurance Company, which they held up as an example of what was likely to happen. By their false statement that defendant could realize \$6,000 as the cash surrender value (it was in fact about \$5,000) of his Union Company policies, they engendered hope in the defendant that he could secure that amount before the ably predicted crash of the Union Company took place. These representations were made so that he would assent and accede to their program and sign the application for policies amounting to \$25,000 in the Columbian Company of which they were the agents.

The situation is not presented of a man who wanted or was anxious to get additional insurance, but of a man who was prevailed upon, according to the allegations of the petition, by unscrupulous agents to get out of a tottering company before it crashed, and take a lesser amount of insurance in a sound company which was to be paid for out of the cash surrender value of the cancelled policies in the Union Company.

When the Columbian policies were presented for delivery and the note in question was presented for defendant's signature, the insurance moratorium had intervened, rendering it impossible





for defendant to realize the cash surrender value of his Union Company policies. Confronted with this situation J. S. Punch agreed that if defendant signed the note it would not be payable unless and until defendant collected the cash surrender value of his Union Company policies, regardless of the terms of the note. At this time defendant still placed full reliance on the false representations of the Punches that the Union Company was in a weak financial condition and that he could secure \$6,000 as the cash surrender value of his Union Company policies with which he might pay the premiums on the new policies.

Under the provisions of sections 59 and 55 of the Negotiable Instruments Act, supra, a defendant has a right to prove, if he can, that the title of the payee who negotiated a note was defective under section 55, and if such a showing is made then the burden would be on the holder to show a holding in due course as required by section 59. (Justice v. Stanekinner, 267 Ill. 448; Farm State Bank v. Waggott, 230 Ill. App. 522.)

Until such a showing is made the holder would be entitled to the presumption under section 59 that he was a holder in due course, and unless such presumption is overcome he would be entitled to a directed verdict. (Skomorska v. Marcotte, 255 Ill. App. 1.)

In our opinion, under the facts and circumstances of this case, it was not obligatory upon defendant to allege that plaintiff was not a holder in due course.

In passing upon this proposition in Beard v. Baxter, 242 Ill. App. 480, the court said at page 486:

"From the facts set out in plaintiff in error's affidavit, it appears prima facie that there was no consideration for the note and that the payee's title to said note was at all times defective. (Bell v. McDonald, 308 Ill. 329.) Such being the case, or upon the prima facie proof being presented, the burden is upon the holder to prove that he, or some person under whom he claims, acquired the title as a holder in due course. (Section 59 of Negotiable Instruments Act, Cahill's St., ch. 98, par. 79; Bell v. McDonald, 227 Ill. App. 120; same case, 308





Ill. 329.)

"In the opinion of this court the plaintiff in error, by affidavits and proof, does not have to show matters, the burden of proof of which is upon the holder of the note, defendant in error in this case."

On page 488 the court said:

"In the opinion of this court the affidavits presented by plaintiff in error contained matters which would constitute a prima facie defense to said note, and, if established, would cast the burden of proof upon defendant in error to show that he acquired the title to said notes as a holder in due course."

If defendant is able to establish by evidence the allegations of his petition to vacate then he will have shown a defective title in the payee, and the burden will be thrown upon plaintiff to justify his good faith and to show that he is a holder in due course.

If the allegations of defendant's petition to vacate the judgment are true and these properly pleaded must be considered so for the purpose of this appeal, defendant should be granted an opportunity to present his defense on the merits.

It was never contemplated by the Negotiable Instruments Act, nor any other law, that a defendant would be foreclosed from making a defense if he has one and offers to present it in apt time.

We have considered all points urged by opposing counsel and all cases cited, along with many others, but in the view we take of this proceeding we deem further discussion unnecessary.

For the reasons indicated the judgment of the Municipal court should be reversed and the cause remanded with directions that the judgment be opened and execution stayed, and that defendant be permitted to file an affidavit of merits and defend, the judgment and execution to stand as security.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley and Scanlan, JJ., concur.

(11. 10.)  
"In the opinion of this court the plaintiff is entitled  
to relief and costs, and the defendant is not entitled to  
any relief or costs."  
and in answer to this writ.

In page 100 the court says:

"In the opinion of this court the plaintiff is entitled  
to relief and costs, and the defendant is not entitled to  
any relief or costs."  
and in answer to this writ.

It defendant is able to establish by evidence the  
allegations of his position as regards the will have shown a  
defective title in the paper, and the matter will be shown soon  
plaintiff to justify his good faith and to show that he is a  
holder in due course.

In the allegations of defendant's position in regard  
the judgment was given and there is no ground for appeal.  
and on the ground of this appeal, defendant cannot be  
entitled to a reversal of the judgment in the matter.

If you were convinced by the evidence in the case  
that the judgment was not a judgment, you would be entitled to  
reversal of the judgment. It is not an error to reverse it in the  
case.

It is not necessary to show that the judgment was  
and all cases alike, and all cases alike, but in the case we  
have at this moment we have shown the judgment was not a  
judgment. The court has shown the judgment of the plaintiff  
must be reversed and the case must be reversed and the  
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and the judgment is not a judgment, and the judgment  
judgment and reversal is shown by evidence.

THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

RECEIVED AND RECORDED 1000



36747

JAMES G. CLARK,  
Plaintiff in Error.

v.

ROSEMAN W. HARRIS,  
Defendant in Error.

1057  
ERROR TO CIRCUIT COURT,

COOK COUNTY.

274 I.A. 668<sup>4</sup>

MR. JUSTICE GRIBBY DELIVERED THE OPINION OF THE COURT.

By this writ of error plaintiff seeks to reverse an order or judgment of the circuit court, entered December 12, 1932, in substance as follows:

This cause coming on to be heard on plaintiff's motion to file ten additional counts, and on defendant's motions to deny such leave and to dismiss plaintiff's suit on the grounds that "the proposed ten additional counts \* \* \* show that the entire suit is based upon an alleged agreement and transaction which are antagonistic to the interests of the public, injurious to the interests of society in general, and corrupt and void;" and the court "having found from an examination of the proposed ten additional counts and the affidavit of Meye Whitman (plaintiff's attorney) that the entire suit is based upon an alleged agreement and transaction which are antagonistic to the interests of the public, injurious to the interests of society in general, and corrupt and void;"

"IT IS ORDERED, first, that leave is denied to file the ten additional counts; second, that the "entire suit is hereby dismissed \* \* \* as being against public policy because based on a corrupt, illegal and immoral transaction, according to the allegations of said ten additional counts, the truth of which is verified by affidavit;" third, that leave is given to defendant "to incorporate into the record by Bill of Exceptions said ten additional counts;" fourth, that leave is given to defendant "to incorporate into the record by Bill of Exceptions the certified copy of divorce proceedings heretofore identified as defendant's Exhibits 1 and 2;" fifth, that leave is given to defendant "to incorporate in said Bill of Exceptions the written opinion of the court heretofore filed on December 8, 1932;" and sixth, that leave is given "to plaintiff to file a Bill of Exceptions within 60 days."

Within the required time a bill of exceptions was marked "presented" by the trial judge. It includes (a) the ten additional counts; (b) the opinion of the court, and (c) certified copies of the bill, answer, testimony heard and decrees entered October 20,





1931, in certain proceedings for divorce, instituted in a court at Reno, Nevada, by Dorothy Funk Clark against her husband, James S. Clark, and in which she was granted a divorce. Thereafter on February 10, 1933, the bill of exceptions was signed and certified by the judge and filed. By stipulation the original bill of exceptions was incorporated in the transcript.

The present action in assumpsit was commenced on May 17, 1932. On the same day plaintiff filed a declaration, consisting of a special count and the common counts, and also filed a written demand for a jury trial. In the special count plaintiff, a resident of the State of New York, complained of defendant, a resident of Illinois, and alleged:

"That defendant, on, to-wit, August 4, 1931, in the State of Wisconsin, duly contracted and agreed, for a valid consideration, to pay to plaintiff on the 1st day of each and every month thereafter, commencing on the 1st day of September, 1931, and continuing during the lifetime of plaintiff, the sum of \$500; by means whereof defendant then and there became liable to pay to plaintiff the said sums of money on the 1st day of each and every month as aforesaid; and being so liable defendant, in consideration thereof, thereafter paid to plaintiff the sum of \$500, on, to-wit, the 1st days of September, October, November and December, 1931, and on, to-wit, the 1st days of January and February, 1932. Yet, although the days of payment of said sum of \$500, on, to-wit, the 1st days of March, April and May, 1932, have elapsed, defendant has not paid to plaintiff the said sums of money nor any part thereof, but refuses so to do, and has repudiated his said liability and obligations in that regard, to the damage of plaintiff in the sum of \$300.00, and, therefore, he brings his suit, etc."

To this declaration defendant filed a plea of the general issue. On September 24, 1932, the attorneys who had commenced the suit and filed the declaration withdrew as plaintiff's attorneys, and Lloyd C. Whitman was substituted and entered his appearance as plaintiff's attorney. On October 24, 1932, after due notice to defendant's attorneys, plaintiff presented his written motion for leave to file the ten additional counts, exhibited to the court. Various grounds for the motion are stated and to the motion is attached the affidavit of Whitman that "the foregoing





grounds are true to the best of his knowledge and information and judgment as an attorney-at-law." The grounds are:

"The original declaration herein was filed herein in the form in which it is under the impression (which was erroneous) that the claim of plaintiff, for which this case was and was intended to be brought, could be recovered on under the common counts, and that it was unnecessary to present in express allegation the various possible legal intendments of the anticipated proofs upon the trial hereof.

Said proposed ten additional counts, and each of them, are necessary to be filed herein in order to enable plaintiff to sustain the action for the claim for which this case was and was intended to be brought, and in furtherance of justice in the premises to claimant, and in order to present in allegation possible variations in the proofs reasonable and properly to be anticipated upon the trial hereof and various intendments of such proofs properly to be anticipated by plaintiff as reasonably or colorably deducible from such proofs in the opinion of the Court or of the attorneys for one or another of the parties hereto.

The allegations of said proposed additional counts, and of each of them, are true in this sense: The evidence upon the trial hereof will tend to support the evidentiary facts (meaning, the pure facts as distinguished from mixed law and facts) presented in each and all of said additional counts, and every allegation of pure fact in said proposed ten additional counts, or in any of them, is true, and evidence will be offered by plaintiff upon the trial hereof tending to support the same."

The bill of exceptions discloses that of the additional counts the first is similar to the original special count, except that it is alleged that on August 4, 1931, at Madison, Wisconsin, "in consideration of plaintiff's promise \* \* not to sue defendant for alienation from plaintiff of the affections of plaintiff's wife, Dorothy Funk Clark," defendant orally promised plaintiff to pay to him on the 1st day of each and every month thereafter, commencing on the 1st day of September, 1931, and continuing during the lifetime of plaintiff, the sum of \$500," etc. The second count is substantially the same as the first, except that the consideration for defendant's oral promise is plaintiff's promise not to sue defendant "for alienation from plaintiff of the affections of plaintiff's wife or for defendant's wickedly debauching and carnally knowing plaintiff's said wife." The third and fourth counts are similar to the second except that at the beginning of the counts are allegations of the marriage of plaintiff, on June 2, 1917, to Dorothy Funk; of the birth







thereafter of their two daughters, Jane and Judith, respectively on January 23, 1923, and February 23, 1926; that plaintiff and his wife lived together until about July 27, 1931; and that "on, to-wit, January 18, 1931, and on divers other days between that time and the making of defendant's oral promise to plaintiff hereinafter set forth," defendant alienated plaintiff's wife's affections, "plaintiff in no wise consenting thereto," and debauched her, etc. The fifth count is similar to the third, and has the following allegations:

"That on, to-wit, January 2, 1931, defendant began paying personal amorous attention to plaintiff's said wife, and continued so to do on divers other days in the period between that time and the making of defendant's oral promise to plaintiff hereinafter set forth, on, to-wit, January 18, 1931, February 15, 1931, and July 27, 1931, at, to-wit, Winnetka, Illinois, Madison, Wisconsin, Lake Forest, Illinois, and Chicago, Illinois; that during said last mentioned period, on, to-wit, July 10, 1931, at, to-wit, New York City, plaintiff was informed and advised in writing by plaintiff's said wife that during plaintiff's absence during said last mentioned period from plaintiff's home (which was then in Madison, Wisconsin,) \* \*, defendant had repeatedly visited and paid personal amorous attentions to plaintiff's said wife, had fallen desperately in love with her, and had represented to her that if she would accept defendant's amorous attentions he would richly provide financially for her children, and had repeatedly urged and begged her to divorce plaintiff and marry defendant, and that because of the great love for her expressed by defendant and defendant's attentions, representations and importings, as last aforesaid, she (plaintiff's wife) was favorably disposed towards defendant and towards his proposals, as last aforesaid; that thereafter, on, to-wit, July 26, 1931, at about midnight (to-wit, 11:50 p.m.) on said last mentioned date, plaintiff returned unannounced from New York City (where he had been continuously for one month) to the home of plaintiff and his said wife at Madison, Wisconsin, and there found in the company of each other plaintiff's said wife and defendant, and also found personal baggage, wearing apparel, including changes of underwear and night clothes, of defendant; that, thereupon on, to-wit, July 27, 1931, at, to-wit, Madison, Wisconsin, plaintiff informed defendant that plaintiff would promptly institute suit against defendant to recover from him for the alienation from plaintiff of the affections of plaintiff's said wife and the debauching and carnally knowing of her by defendant; that thereupon, \* \* in consideration of plaintiff's oral promise not to sue defendant \* \* defendant orally promised plaintiff to pay to him on the 1st day of each and every month thereafter, commencing on the 1st day of September, 1931, and continuing during the lifetime of plaintiff, the sum of \$200, etc."

The sixth count is similar to the fifth. The seventh is also similar to the fifth, except that, instead of the allegation as to plaintiff being "informed and advised in writing by plain-

the latter could be similar to the first, and had the following "placit" in no wise connecting character," and detached part, etc. out later." Colonel witness placit's wife's relations, the making of defendant's oral promise to placit's brother-in-law January 18, 1931, and on given other days between that time and wife lived together until about July 27, 1931; and that "and in-1931, on January 22, 1932, and January 23, 1934; that placit and his character of their two daughters, Jane and Lucille, respectively

[illegible]

The right way is called the right way.

and I have only to be honest and square with all and to make my own

as an alternative being "informal and subject to review by the in-



tiff's said wife, etc.," it is alleged that "on, to-wit, July 27, 1931, plaintiff had reasonable grounds for believing and believed that he had reasonable grounds for suing defendant for alienation from plaintiff of the affections of his said wife and loss by him of the services and society of said wife in plaintiff's domestic affairs."

In the eighth, ninth and tenth counts, besides alleging defendant's oral promise to pay to plaintiff \$500 a month, etc., there are allegations as to defendant's further promises to set up a trust fund for the benefit of plaintiff and plaintiff's children and to make a certain will. And in the ninth and tenth counts a certain letter, written by defendant to plaintiff under date of August 4, 1931, and a copy of a certain will of defendant, are set forth. In the eighth count, after setting forth the marriage of plaintiff and Dorothy Munk, the birth of their two children, the alienation of the affections and the debauching of plaintiff's wife by defendant, and plaintiff's said oral promise not to sue defendant, etc., it is alleged:

"That thereafter on, to-wit, August 4, 1931, at, to-wit, Madison, Wisconsin, in consideration of plaintiff's said oral promise not to sue defendant, etc., defendant orally promised plaintiff that at defendant's earliest reasonable convenience he would put in trust for plaintiff and plaintiff's said two children a fund of at least \$200,000, the income of which trust fund would be payable to plaintiff for life, and the principal of which trust fund, subject to plaintiff's life interest, would belong to said two children, and upon plaintiff's death would be divided equally between said two children, their heirs and personal representatives, and that meanwhile, and until said fund was put in trust by defendant for plaintiff and his said children (as promised by defendant), defendant would pay plaintiff on the 1st day of each and every month thereafter, commencing on the 1st day of September, 1931, at least \$500, and would immediately make, execute and keep in force and effect until the creation of said trust or the death of defendant, a last will and testament, in and by which defendant would bequeath to said two children at least \$200,000; that in consideration of defendant's last-mentioned promises plaintiff, on, etc., at, etc., orally promised defendant not to sue him, \* \*, which promise plaintiff has ever kept; that by means thereof defendant then and there became liable to put in trust \* \* a fund of at least \$200,000, \* \* and meanwhile \* \* to pay to plaintiff on the 1st day of each and every month \* \* at least \$500, and immediately on, to-wit, August 4, 1931, make \* \* a last will and testament, \* \*; and that being so liable, defendant, in consideration thereof, \* \* thereafter on, to-wit,





February 1, 1932, paid plaintiff \$3,000. Yet defendant has never created said trust and has not made and kept in force and effect a last will and testament \* \*, and although additional payments of \$500 each have accrued \* \*, defendant has not paid to plaintiff any of them \* \*, but has wholly failed and refused so to do, and on, to-wit, February 2, 1932, \* \* repudiated his liability and obligation \* \* and notified and advised plaintiff that he would not make any further payments to plaintiff at any time, and would not create said trust \* \*, and would not make \* \* any such last will and testament \* \*; to plaintiff's damage in the sum of \$300,000, etc."

The tenth count is more comprehensive. It contains substantially the same allegations as in the eighth count, and also many of the allegations of the other counts, including those of the fifth (as above set forth) relative to the information plaintiff received from his wife, in writing, on July 10, 1931, and to his return "unannounced" to his home at Madison about midnight on July 26, 1931, and what he then and there discovered, etc. In the tenth count, also, as well as in the ninth, are set forth (following appropriate allegations) a photostatic copy of defendant's letter to plaintiff, bearing date of August 4, 1931, and a copy (enclosed in the letter) of a "Last Will and Testament" of defendant. The copy of the letter, written in long hand, is as follows:

"Chicago, August 4, 1931.

Mr. James Clark,  
Lakewood,

Madison, Wis.

Dear Mr. Clark:

I wish to confirm our verbal understanding that I will contribute \$500 a month indefinitely towards the support and education of Jane and Judith Clark, beginning Sept. 1st, 1931.

It is understood that there will be no change in the above agreement except by mutual consent. I am enclosing copy of will I have just executed which shows that they will be amply provided for in the event of my death within the next few months.

Sincerely,

Norman W. Harris."

By Article 2 of said will defendant gives to his wife, Josephine R. Harris, all household furniture, etc., located on premises known as 594 Spruce Street, Winnetka, Illinois; by Article 3 he gives to his "dear friend, Dorothy F. Clark, to whom I am greatly indebted," his "farm at Williams Bay, Wisconsin,







together with all household furnishings and furniture," etc., located on the premises, and "also all personal effects, including pictures and old prints \* \* located at my office, Room 401, 111 West Monroe Street, Chicago;" by Article 4 he devises and bequeaths "one-third of the rest, residue and remainder" of his estate to his said wife, Josephine, "if she shall survive me, as her absolute property;" and by Article 5 he devises and bequeaths the "remaining two-thirds" of the residue of his estate, or all of said residue if his wife does not survive him, to the Harris Trust & Savings Bank of Chicago, as Trustee, in trust to pay the net income to Dorothy F. Clark during her life, and, upon her death and that of the testator, to divide the trust estate into two equal funds, one for Jane Clark and one to Judith Clark, daughters of Dorothy F. Clark, and to pay the income thereof to them until they attain the age of 25 years, and then to pay to them the corpus, but that if Dorothy F. Clark and both of said children and the testator die before either of said children becomes 25 years of age, the corpus is to be distributed to the heirs of the child last surviving, or, in default of such heirs, to the testator's lawful descendants.

The bill of exceptions further discloses that on November 17, 1932, the cause came on for hearing upon plaintiff's motion for leave to file the additional counts, and the two counter motions of defendant (a) that such leave be denied and (b) that plaintiff's suit be dismissed "on the ground that on the face of the proposed ten additional counts said cause is based upon an alleged agreement and transaction antagonistic to the interests of the public and injurious to the interests of society in general and corrupt and void." During the arguments on the motions, J. Fred Reeve (attorney for defendant) stated in substance that, inasmuch as Mr. Whitman (attorney for plaintiff) "had seen fit to go outside

The bill of exchange payable to order of the  
 bank, the sum of ten thousand dollars, was  
 cashed by the bank on the 1st day of January, 1901.  
 The bill was cashed by the bank on the 1st day of  
 January, 1901, and the proceeds were paid to the  
 order of the bank. The bill was cashed by the bank  
 on the 1st day of January, 1901, and the proceeds  
 were paid to the order of the bank. The bill was  
 cashed by the bank on the 1st day of January, 1901,  
 and the proceeds were paid to the order of the bank.



of the record," and make certain statements concerning prior negotiations for a settlement of the cause made before Mr. Whitman had been substituted as plaintiff's attorney, he (Reeve) believed he had the right to acquaint the court concerning certain facts also outside of the record. And thereupon the following statements in part were made by opposing counsel:

"MR. REEVE: \* \* \* I have before me, your Honor, certified copies of a proceeding in a court of Reno, Nevada, from which it appears that on a sworn bill, charging extreme and repeated cruelty, Mrs. Clark divorced her husband a few months after this alleged occurrence of the discovery of Norman Harris in the home \* \*.

MR. REEVE (continuing): Now, Mr. Whitman's argument seemed to proceed upon the theory that the question before the court was the sufficiency of these various counts on demurrer, or whether he had yet to state his cause of action in several different counts and in any number of inconsistent matters. That I conceive is not the question in the case. The question which we raise is, whether the sworn allegations of these counts, when you put them together, disclose a transaction void as against public policy. \* \* Mr. Clark comes in with a sworn declaration, after his wife has divorced him for cruelty in a proceeding in which he was a party, represented by counsel and consenting to the decree. He comes in here for money and brands his wife, and the mother of his two children, as a confirmed adulteress. \* \*

MR. WHITMAN: I am not disposed, your Honor, to pursue counsel's argument about divorces in Reno and outside things here. The matter before your Honor has got to be decided upon the face of the documents before you."

The bill of exceptions further discloses that after the arguments on the motions were concluded, the court took the questions raised by the motions under advisement and thereafter, on December 8, 1933, delivered a somewhat lengthy opinion or decision, in which in conclusion he directed that an order or judgment be drafted and entered (substantially in accord with the order or judgment that was subsequently entered as first above mentioned), and in which he further directed that "the certified copy of the divorce proceedings in the case of Dorothy Funk Clark v. James G. Clark in the Nevada court be admitted in evidence, and be incorporated in the bill of exceptions." On the same day, after the rendition of the decision, the following occurred:

"MR. REEVE: I have here marked, as Defendant's Exhibits 1 and 2, the proceedings of the Second Judicial District Court of





the State of Nevada, County of Washoe, in the matter of Dorothy F. Clark, plaintiff, vs James G. Clark, defendant, which we desire to submit to the court and have the record show were submitted prior to the entry of the order. The theory upon which they are being offered is that it is within the Court's discretion to permit or deny the filing of amendments; and, these being certified copies of the proceedings, we believe they are proper to be before the court.

MR. WHITMAN: These two documents were referred to by Mr. Reeve in his argument on the motion, but they were not offered in evidence. The hearing was not open to the offer of evidence. In other words, the motion heard by your Honor was a motion to dismiss this suit on the face of the record. We did not have a hearing on offer and receipt of evidence. In that connection, also, your Honor, in your opinion, stated that certain statements were made by counsel at this hearing and were uncontradicted by me. \* \* Among the statements your Honor quoted and attributed to counsel are statements with reference to the divorce suit, the record of which he says is here, but about which I knew and knew nothing except as counsel informed me. \* \* I cannot be concluded by evidence not offered or evidence not receivable upon the motion which has been heard."

In the court's said opinion or decision, after mentioning the three motions and outlining some of the differences in the allegations of the ten additional counts, it is stated in part substantially as follows:

That the point made by defendant's counsel on the oral argument, and in their written brief submitted, is that for various stated reasons "the agreement set up in the proposed additional counts is void," and that "the transaction is against public policy and public morals."

That the court states that "the law is that if at any stage of the proceedings it appears to the court that the agreement sued upon is against public policy because of corruption, it is the duty of the court to dismiss the suit on its own motion;" that the decisions in the cases of Greenough v. Winchester Arms Co., 103 U. S. 261, and Gun Oil Co. v. Garren, 261 Ill. App. 513, "held that such is the law."

That the court points out that the truth of the allegations in the proposed additional counts is sworn to by plaintiff's attorney, an officer of the court, and that, therefore, the court is of the opinion that "if any of the additional counts alone (in spite of the allegations of other counts) sets up a transaction which is corrupt and against public policy, the entire suit because of this affidavit, would have to be dismissed;" that the first five additional counts "cannot be considered apart from the affidavit and the remaining counts;" that the "cumulative effect" of the facts as alleged in all of the counts discloses "collusion between plaintiff and his wife," and leads the court to believe that they "arranged to entrap the defendant;" and that in the court's opinion "these two people were operating a badger game, and the court is surprised and even shocked at the audacity of plaintiff coming into this court and trying to use this court to collect damages from defendant."



the fact of Nevada, County of Washoe, in the matter of Nevada  
County, Nevada, vs James A. Clancy, Defendant, which was  
pending in the County Court of Nevada, the County Court  
advised that on the 27th day of the month of June, 1914,  
which they are being offered in this is within the County  
Division of Nevada of which the County Court is a part,  
there being certified copies of the proceedings, we believe  
they are proper to be before the court.

MR. JUSTICE: These two documents were referred to  
by Mr. Justice in his opinion on the motion, but were not  
admitted in evidence. He has not yet seen them in the  
evidence. In other words, the motion made by your Honor was  
a motion to admit this into the case of the Nevada vs  
James A. Clancy, on the 27th day of the month of June, 1914,  
and that was a hearing on the motion and evidence of evidence.  
That motion, also, your Honor, in your opinion, stated that  
certain documents were made by Nevada vs James A. Clancy  
and admitted by me. I admit the documents your Honor moved  
and admitted to be correct and admitted with evidence in the  
evidence of which he says in his motion, but about  
which I have not been hearing since, as stated in evidence  
I cannot be convinced by evidence that I believe the  
documents from the motion which was made.

In the court's opinion on the motion, after admitting  
the three motions and admitting some of the witnesses in the  
evidence of the two additional motions, it is stated in your  
opinion as follows:

That the points made by Nevada's counsel on the oral  
evidence, and in their written brief submitted, in that the  
witnesses stated "the documents" was in the evidence  
admitted in evidence, and that the documents in evidence  
were in evidence and public records.

That the court stated that "the law is that if an  
evidence of the documents is shown to the court that the  
documents were in evidence and public records of corruption,  
it is the duty of the court to admit the same as the evidence."  
That the court in the case of Nevada vs. James A. Clancy,  
100 N. 2d, and 100 N. 2d, and 100 N. 2d, said  
that such is the law.

That the court stated that the court of the  
evidence in the proposed additional documents in motion to be  
admitted in evidence, as stated in the court's opinion, that  
the court in its opinion that "the law is that if an  
evidence in evidence of the documents in evidence made up a  
document which is in evidence and public records of corruption,  
it is the duty of the court to admit the same as the evidence."  
That the court in the case of Nevada vs. James A. Clancy,  
100 N. 2d, and 100 N. 2d, and 100 N. 2d, said  
that such is the law.



That the court "does not believe that these counts (ninth and tenth) can be separated so that such counts as do not set up this illegal transaction can stand where the others fall. It is represented to the court by the affidavit of plaintiff's lawyer that all of the facts set up in each of the counts are true. The counts are cumulative. The ninth and tenth counts describe the entire transaction, and the court holds that these counts set up a transaction which is absolutely void, immoral and shocking to the court."

"Another thing which has impressed the court is the fact which is not set up in the additional counts, and which was brought forth in the oral argument, viz., counsel for defendant, without objection, read to the court from a certified copy of certain divorce proceedings in Reno, Nevada, in which plaintiff's wife obtained a decree of divorce from plaintiff on the ground of cruel and inhuman conduct. This divorce was obtained shortly after the transaction set up in the additional counts. Counsel for defendant announced on the argument that plaintiff was a party to these divorce proceedings, that he was represented by counsel therein, and that he consented thereto. The court has not examined said certified divorce proceedings, but counsel's statement was not disputed."

After carefully reviewing the present record, and considering the court's opinion or decision and the briefs and arguments of opposing counsel, we have reached the conclusion that the court erred in entering the order or judgment in question, wherein plaintiff was denied leave to file the ten additional counts presented, and plaintiff's suit was dismissed, "as being against public policy because based on a corrupt, illegal and immoral transaction according to the allegations of said ten additional counts, the truth of which is verified by affidavit."

It is our opinion that the original special count (above set forth), as filed by plaintiff's former attorneys on the day the suit was commenced on May 17, 1932, states a good cause of action. Defendant did not demur to it but filed a plea of the general issue. On October 24, 1932, after Mr. Whitman had been substituted as plaintiff's attorney, he filed a written motion in plaintiff's behalf for leave to file the ten additional counts, supporting the motion by certain written grounds and his affidavit. Among the grounds it is stated that the filing of the additional counts was necessary to enable plaintiff to sustain his action, etc., and that





the allegations of the proposed counts were true in a particularly stated sense. In his affidavit it is stated that said grounds "are true to the best of his knowledge and information and judgment as an attorney at law." Under the provisions of section 38 of our former practice act then in force (Cahill's Stat., 1931, chap. 110, p. 2176), and the prevailing practice in this and other States, it was plaintiff's right to make a motion to file the additional counts. In 49 Corpus Juris, sec. 174, p. 133, it is said: "The statement of the same cause of action in different ways or forms, each in a separate count, so as to meet different possible phases of the evidence as it may be developed at the trial, or so as to meet different possible legal views, is permissible, not only at common law, but also under some statutes." In 1 Chitty's Pl., p. 424, it is said: "Before the pleading rules, Hil. 7. 4 W. 4, r. 5, a declaration might consist of numerous counts, \* \* and it was usual, particularly in assumpsit and in actions on the case, to set forth the plaintiff's same cause of action in various chapters in different counts, so that if he failed in the proof of one count he might succeed on another. Such additional counts have been aptly termed safety valves." And it is our opinion, after examining the allegations of the ten additional counts presented, that each on its face discloses a good cause of action.

From the written decision of the court it appears that the court was of the opinion that the ninth and tenth counts disclosed a contract or transaction "which is absolutely void, immoral and shocking to the court." Even if this were so, we do not think it would justify the court in refusing to allow plaintiff to file the other eight counts and in dismissing the entire suit. In 49 Corpus Juris, sec. 122, p. 125, the writer says: "While the party should be bound by allegations of his pleadings deliberately made, \* \* the general rule is that, where there are several counts in the



the allegations of the proposed counsel were true in a hypothetical  
"factual setting." In this situation it is stated that such grounds  
"are true to the best of his knowledge and information and belief"  
as an attorney at law. Under the provisions of Section 10 of  
our former practice act when he took Exhibit's case in 1921, 1922,  
1923, 1924, 1925, and the provisions of the new act in 1926 and 1927,  
it was Plaintiff's right to make a motion to take the deposition  
of the defendant. In the latter cases, 1926, 1927, it is stated that  
Plaintiff of the same of course is entitled to take the deposition  
of the defendant. In the former cases, 1921, 1922, 1923, 1924, 1925,  
such in a separate sense, as to the need of different possible grounds  
of the evidence as it may be developed at the trial, or as to the  
need of different possible legal views, is immaterial, not only as  
to the law, but also as to the facts. In the latter cases, 1926,  
1927, it is stated: "Before the preceding cases, 1921, 1922, 1923,  
a decision might be made of numerous questions," and it was  
held. Particularly in questions and in questions on the facts, as to  
whether the plaintiff's case was of course to be taken in the  
different courts, as that it is stated in the book of one court in  
which context we are now. In the latter cases, 1926, 1927,  
"and it is not required that the plaintiff should make a motion  
for the taking of the deposition of the defendant." And again  
the allegations of the proposed counsel presented, that such  
in the latter cases, 1926, 1927, and again it is stated:  
"From the nature of the case it appears that  
the court was of the opinion that the plaintiff and counsel should be allowed  
a hearing on the question which is absolutely void, immaterial and  
irrelevant to the issue." Then it is stated that, "we do not think it  
would fairly be stated to be correct to allow Plaintiff to take the  
deposition of the defendant and to limit the entire case. It is  
fair, and it is the duty of the court to allow the plaintiff to  
be heard by allegations of the defendant's statements, and it is  
the general rule in such cases that there are several counts in the

same declaration, or a variety of pleas, an allegation in one count or plea cannot be insisted upon by the adverse party as an admission of fact for a purpose distinct from the proof of such count or plea." And in sec. 12, p. 162, the writer also says: "The theory of separate counts is that each is a complete cause of action, as distinct from others as if it stood alone in the pleading. \* \* Generally speaking, each count or separately stated cause of action must be complete in itself and set out a complete cause of action; its sufficiency is to be tested by its own averments; and it cannot be either aided or defeated by averments in another count or separately stated cause of action, which are not repeated or incorporated by reference in the count in question." (See Porter v. Brennan, 13 Ill. App. 362, 365; Hess v. Chicago, etc. R. Co., 225 Id. 633, 638; Burke v. Bank, 13 Wis. 216, 222; Train v. Emerson, 137 Ga. 730, 731.)

In said written decision the court expresses the further opinion that "if at any stage of the proceedings it appears to the court that the agreement sued upon is against public policy because of corruption, it is the duty of the court to dismiss the suit of its own motion." We have reviewed the two cases cited in said decision, but, in our opinion, they do not support it or the judgment now in question. Both of the cited cases concern actions of a trial court after the pleadings had been settled and the case was on for trial before a jury. In the McCannan case (103 U. S. 261) it is held that where it is shown by the opening statement of plaintiff's counsel that the contract on which the suit is brought is void, as being either in violation of law or against public policy, the court may direct the jury to find a verdict for defendant. The Court says (p. 263): "The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced. The







question in either case must be whether the facts upon which it is called to instruct the jury be clearly established. If a doubt exists as to the statement of counsel, the court will withhold its directions, as where the evidence is conflicting, and leave the matter to the determination of the jury." In Sun Oil Co. v. Garren, 261 Ill. App. 513, plaintiff sought to recover in assumpsit the sum of about \$1300 for merchandise sold to defendant under a written contract, and defendant had filed a plea of set-off claiming damages in a greater amount. Upon a trial before a jury counsel for the opposing parties each made opening statements. After defendant's counsel had made his statement, in which he outlined in substance the allegations of defendant's plea of set-off and the facts he expected to prove, the court, summarily and of its own motion, directed the jury to return a verdict in favor of plaintiff and entered judgment against defendant on the verdict. The appellate court reversed the judgment and remanded the cause. In its opinion the court comments on the Jacanyan case, and other cases, including Pietsch v. Pietsch, 245 Ill. 454, from which quotations are made. In the Pietsch case the action was in forcible detainer. On the trial plaintiff's attorney made an opening statement to the jury, outlining the facts he proposed to prove, and, in turn, defendant's attorney stated the facts he expected to show in defense. Thereupon, immediately following defendant's attorney's statement, the court instructed the jury to return a verdict finding defendant guilty of unlawfully withholding possession of the premises and that the right of possession was in plaintiff. The court entered judgment on the verdict. The judgment was affirmed by the appellate court for this district, but on certificate of importance and further appeal the Supreme court reversed the judgment and remanded the cause.

In the written decision of the court in the present cause





the court also expressed the opinion that the "cumulative effect" of the facts as alleged in all of the counts discloses "collusion between plaintiff and his wife," that they "arranged to entrap the defendant" and that they "were operating a badger game." We are unable to say that the allegations of either the ninth or tenth additional counts, or of those of any other count, can be held to justify such an opinion. In view of the above quoted paragraph of the court's opinion relative to the certified copy of the divorce proceedings instituted by plaintiff's wife in Reno, Nevada, which document it appears was "read to the court" on the hearing of the motions, we think the court probably was influenced by the document in reaching his conclusion and decision. And it is clear to us that the court, in passing upon the three motions as first above mentioned, should have limited itself solely to the consideration of the then existing record (viz., the proposed ten additional counts exhibited, the stated grounds for their filing, etc.), and should not have allowed said document to have been exhibited and read. As aptly said by plaintiff's attorney (during the argument as above mentioned): "The hearing was not open to the offer of evidence."

For the reasons indicated the order or judgment of the circuit court of December 12, 1932, is reversed, and the cause is remanded with directions to allow plaintiff's motion to file the ten additional counts as presented, and for further proceedings in accordance with law and existing practice and procedure.

REVERSED AND REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Scanlan, J., concur.





36750

FIRST NATIONAL BANK OF BLUE  
ISLAND, a corporation, as  
administrator of the estate  
of Theodore Wibelmann, deceased,  
Appellee,

v.

THE CHICAGO, ROCK ISLAND AND  
PACIFIC RAILWAY COMPANY, a  
corporation,  
Appellant.

106 H  
APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

274 I.A. 669<sup>1</sup>

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT,  
AFTER REHEARING GRANTED.

In an action for damages for negligently causing the death of plaintiff's intestate there was a trial before a jury in February, 1933, resulting in a verdict finding the defendant guilty and assessing plaintiff's damages at \$6,000. On March 11, 1933, judgment was entered against defendant for that amount and the present appeal followed.

On March 6, 1934, this court reversed the judgment and remanded the cause on account of errors of the trial court in the giving of certain instructions offered by plaintiff. Thereafter plaintiff's petition for a rehearing was allowed, to which defendant filed an answer, and plaintiff's counsel, by leave of court, filed a memorandum of additional authorities. We have again reached the conclusion that the judgment should be reversed and the cause remanded because of the giving of two of said instructions, herein-after mentioned.

Plaintiff's declaration consisted of five counts, to which defendant filed a plea of the general issue. During the trial the plaintiff withdrew from the jury's consideration the

1917

THE NATIONAL BANK OF NEW YORK  
INCORPORATED IN THE STATE OF NEW YORK  
OFFICE OF THE NATIONAL BANK OF NEW YORK  
AT NEW YORK, NEW YORK

THOMAS W. BROWN  
CASHIER

274 I.A. 663

THE CHIEF OF POLICE  
CITY OF NEW YORK  
OFFICE OF THE CHIEF OF POLICE  
AT NEW YORK, NEW YORK

MR. J. J. BROWN, CHIEF OF POLICE, NEW YORK  
OFFICE OF THE CHIEF OF POLICE, NEW YORK

In an action for damages for negligently causing the death of Plaintiff's intestate there was a trial before a jury in February, 1917, resulting in a verdict finding the defendant guilty and assessing Plaintiff's damages at \$5,000. On March 11, 1917, judgment was entered against defendant for that amount and the present appeal followed.

On March 14, 1917, this court reversed the judgment and remanded the cause for retrial at the trial court in the giving of certain instructions offered by Plaintiff. Thereafter Plaintiff's petition for a new trial was allowed, on which day was filed an answer, and Plaintiff's motion for leave of court filed a memorandum of additional evidence. He has again reached the conclusion that the judgment should be reversed and the cause remanded because of the giving of two of said instructions, herein after recited.

Plaintiff's recitation consisted of five grounds, to which defendant filed a plea of the general issue. During the trial the Plaintiff withdrew from the jury's consideration the



second count, which charged willful and wanton negligence. In the first count it is alleged that on May 7, 1930, defendant, a railroad corporation, was possessed of divers yards, rights of way and tracks, over which it caused to be operated and propelled divers locomotives and cars used in the conveyance of passengers and freight; that on said day plaintiff's intestate was a guest, riding in a certain motor vehicle, then being operated in a westerly direction upon a public highway known as Grove street in Blue Island, Cook County, Illinois, and across defendant's tracks; that plaintiff's intestate "was at all times in the exercise of ordinary care for his own safety;" that defendant then and there "negligently caused, permitted and allowed a certain locomotive and tender, then and there operated by defendant over said tracks, to forcibly and violently run into and strike against said motor vehicle, in which plaintiff's intestate was then and there riding in the exercise of ordinary care for his own safety;" that thereby plaintiff's intestate was so greatly out and injured that he then and there died; and that he left him surviving his widow and several children (naming them), etc.

The other counts contains similar allegations. The third count charged that defendant's flagman, stationed at the public crossing, negligently invited plaintiff's intestate and other persons to cross over the railroad tracks, and negligently failed to give proper signals and warnings of the approach of the locomotive and tender. The fourth count charged that defendant negligently caused the locomotive to be backed across the highway without maintaining on the tender of the locomotive sufficient and proper lights, signals or warnings. The fifth count charged that defendant negligently caused the locomotive to be backed across the highway without giving sufficient and proper signals





or warnings of its approach.

On the trial five witnesses testified in plaintiff's behalf, viz., William Biege (the driver of the motor vehicle or automobile); Austin Breece (a passenger therein); John W. and Harry Richardson, father and son (eyewitnesses to the accident), and Agnes Ness (a daughter of plaintiff's intestate.) For defendant eight witnesses gave testimony, including the fireman and engineer of the locomotive (which collided with the automobile), the flagman at the crossing at the time, and other employees of defendant. Numerous photographs, showing the place of the accident and surroundings, were introduced in evidence.

Blue Island is a suburb of Chicago, about 16 miles from defendant's main station in Chicago. Grove street in Blue Island is a paved street, running east and west, about 37 feet wide from curb to curb, and with sidewalks on each side about 5 feet distant from the curb. It crosses eight tracks of defendant practically at right angles. Commencing at the east there are three "main line" tracks, then two "suburban" tracks and then three "switch" tracks. The width of the three main line tracks is about 34 feet, and the distance between them and the suburban tracks to the west is about 70 feet. About 100 feet north of Grove street and between the main line tracks and the suburban tracks is defendant's Blue Island passenger depot, connected with Grove street by a brick pavement. The first street south of Grove street is Fulton street, the next is Union street and the next is Western avenue. South of the south sidewalk of Grove street and immediately west of the main line tracks is located a small flagman's shanty. In the vicinity of Fulton street the main line tracks and the suburban tracks converge. In the triangle made by Grove street as its base and the main line tracks and the suburban tracks as its sides, there are no buildings except the flagman's shanty. And from



or workings of the apparatus.

On the trial five witnesses testified in Plaintiff's

behalf, viz.: William Biege (the driver of the motor vehicle

in question); Harry Biege (passenger therein); John H.

and Harry Richardson, father and son (witnesses to the

accident); and James H. H. (owner of Plaintiff's automobile).

Four defendant's witnesses gave testimony, including the fire-

man and engineer of the locomotive (which collided with the auto-

mobile); the fireman at the crossing at the time, and other

witnesses of the accident. Photographs showing the place

at the accident and surroundings, were introduced in evidence.

Five miles is a suburb of Chicago, about 10 miles from

Chicago. A main street in Chicago. There is a main street

in a paved street, running east and west, about 25 feet wide from

each side, and with sidewalks on each side about 5 feet distant

from the curb. It crosses street tracks of defendant practically

at right angles. Commencing at the east there are three "main

line" tracks, then two "suburban" tracks and then three "local"

tracks. The width of the three main line tracks is about 10 feet,

and the distance between them and the suburban tracks is the way

is about 10 feet. About 100 feet north of Grove street and between

the main line tracks and the suburban tracks is defendant's line

"first passenger depot" connected with Grove street by a bridge

crossing. The first street south of Grove street is Union

street. The road to Union street and the road to Chicago street

south of the south sidewalk of Grove street and immediately west

of the main line tracks is located a small Plaintiff's alleyway. In

the vicinity of Union street the main line tracks and the suburban

tracks converge. In the triangle made by Grove street and the main

and the main line tracks and the suburban tracks as the street

there are no buildings except the Plaintiff's alleyway. The fire

Grove street, along both lines of tracks there is nothing to obstruct one's view to the south for a long distance, except said shanty.

The accident happened after dark, on a clear night, about 9:45 p. m., central standard time, on the north side of Grove street and where it is intersected by the most westerly of defendant's two suburban tracks. The nearest electric street light to the place of the accident was one about 50 feet away, suspended from a pole, about 25 feet above the ground, at the southwest intersection of Grove street and defendant's tracks. The crossing and tracks were otherwise illuminated by other electric lights in the vicinity.

Biége, the driver of the automobile, testified in substance that shortly prior to the accident, he met Breeze and Wibelaman at a soft drink parlor on Grove street, east of the tracks; that he offered to take them to their respective homes in his automobile; that they started and went west on Grove street, Wibelaman sitting on the right of the front seat and Breeze on the rear seat; that as the car approached the tracks he (the witness) noticed a freight train coming from the north on one of the main line tracks, but he drove the car across the main line tracks in front of the on-coming train, and, just before reaching the suburban tracks, stopped the car and "looked both ways;" that Wibelaman, from his place in the front seat had just as good a view of the surroundings in front of my car as I did;" that although there was nothing to obstruct the view to the south, he (the witness) did not know that there was a locomotive approaching the crossing from the south; that he did not hear any bell or whistle or "see any headlight or lights of any kind upon the locomotive;" that he proceeded to cross the suburban tracks, and that just as he reached the second track, "I came in contact with the engine, and



grave street, along both lines of tracks there is nothing to obstruct one's view to the south for a long distance, except and

The accident happened after dark, on a clear night.

about 6:15 p. m., several standard time, on the north side of Grove street and where it is intersected by the most westerly of the tracks and a few minutes later. The witness electric street light in the place of the accident was not about 10 feet away, suspended from a pole, about 25 feet above the ground, at the southeast intersection of Grove street and defendant's tracks. The crossing and tracks were otherwise illuminated by other electric lights in the vicinity.

Next, the driver of the automobile, testified in and

witness that electric light in the accident. He was driving an automobile at a fast rate of speed on Grove street, west of the street, that he started to turn into the intersection of Grove street, his automobile, that he started and went west on Grove street, his automobile, that he started on the right of the track west and Grove on the west side; that as the car approached the tracks he (the witness) noticed a bright light coming from the north on one of the main line tracks, but he drove the car across the main line tracks in front of the on-coming train, and, just before reaching the

defendant's tracks, stopped the car and "looked both ways;" that

"witness, from his place in the front seat had had a good view of the surroundings in front of us as I did; that although there was nothing to obstruct the view to the south, he (the witness) did not know that there was a locomotive approaching the crossing from the north; that he did not hear any bell or whistle or any whistle or other sound of any kind upon the locomotive; that he proceeded to cross the defendant's tracks, and that just as he reached the south track, "I came in contact with the engine, and



I didn't know anything more until I woke up in the hospital."

The testimony of Breeze was to the same effect. Neither Biege nor Breeze gave any testimony as to any sayings or actions of Wibelman after the automobile had reached defendant's tracks and was crossing them. Breeze testified: "As I went across the railroad tracks I did not see what Wibelman was doing."

The testimony of plaintiff's witnesses, John S. and Harry Richardson, was to the effect that they were seated in an automobile, standing just south of defendant's station, and witnessed the accident from that point; that they saw the automobile cross defendant's main line tracks, saw the locomotive approach the crossing and saw the collision; that they did not notice any headlight on the locomotive or hear any bell or whistle, but that when they went to the place of the accident, immediately after its occurrence, they noticed that both headlights on the locomotive were burning, - one "over the cow-catcher" and the other "on the back of the tender."

Defendant's principal witness was Benjamin Germano, the fireman of the locomotive, who was seated on the east or left side of the cab. He testified in part:

"When we arrived at Blue Island that night from Chicago, the engine "pulled" the train in. \* \* After the train had been "backed" towards the north and into the yards, and after the cars had been uncoupled from the engine, we went south to Western avenue, and after getting a signal, "we backed up to Grove street and then the accident happened." \* \* There were head lights on each end, - one on the tank and one on the engines. Both headlights were burning. \* \* These headlights are electric and are turned on and off by a switch in the cab. In the engine there are other lights, including "the deck-light over the roof of the cab." \* \* On our way to Grove street from Western avenue we were going about 7 or 8 miles an hour. "I was sitting on the seat box hanging out of the window on the east side of the engine. \* \* I saw the crossing flagman and heard his whistle. \* \* About that time our engine was about on the south sidewalk of Grove street. \* \* I seen this automobile coming ahead of the freight train on the westbound main line, and all I could do was to let out a squawk and pull the whistle, when he hit the back of the tank. \* \* I should judge the automobile was going about 45 or 50 miles an hour. \* \* It did not stop at any time from the time I first saw it until the collision happened. It did not draw up





and stop within 5 or 6 feet of the suburban tracks. I saw it try to avoid the engine. It was a little bit further north than the center of the street. \* \* It looked to me as though he tried to go on at an angle to get around the engine and he hit the back buffer of the tank." \* \* The car landed between the curb and the sidewalk on the north side of Grove street just clear of the south bound suburban track. \* \* The bell on the engine was ringing. \* \* It is operated automatically by air. \* \* It continued to ring all throughout the trip from the station and as we went to Western avenue and as we came back. And it was ringing at the time of the collision.

The two given instructions referred to, offered by plaintiff, are Nos. 1 and 3. Instruction No. 1 reads as follows:

"1. The jury are instructed that if you find from the evidence, under the instructions of the Court, that the deceased was a guest in the automobile in which he was riding, and that he had no control over the operation of said automobile, and if you further find from a preponderance of the evidence, that at and before the time of the happening of the accident complained of in this case, the deceased was in the exercise of ordinary care for his own personal safety, and if you further find from the evidence, that the injury and death of the deceased were caused as a proximate result and in consequence of the negligence of the defendant, if any, as charged in plaintiff's declaration, then you are instructed that the fact, if it be a fact, that the driver or operator of the automobile in which the deceased was riding, was guilty of some negligence, which contributed to causing the injury and death of the deceased, the negligence, if any, of the driver of the automobile in which the deceased was riding, cannot be imputed or charged to him in this suit. (Given.)"

While the giving of a similar instruction might not be considered an error in some cases, we are of the opinion that under the particular evidence in the present case its giving was prejudicial to defendant in that it tended to mislead and confuse the jury. It was an essential part of plaintiff's case to prove that at and immediately before the time of the accident Wibelman was in the exercise of ordinary care for his own safety, (App v. Fryer, 294 Ill. 538, 547; Dee v. City of Peru, 343 Ill. 36, 41.) As said in the Dee case, plaintiff "had the burden of affirmatively showing that deceased was in the exercise of due care and caution for his own safety at the time of the accident which resulted in his death, or, in the absence of direct testimony, showing such care that reasonable inferences of such due care and caution might be drawn from the circumstances disclosed by the evidence." In



and even within 3 or 4 feet of the defendant's head. I saw it  
fly in front of me. I saw a little bit further north than  
the witness at the same time. \* \* \* It looked to me as though he  
was not so far as the angle he was making and he was  
the back of the head. \* \* \* The witness between the  
two and the witness on the north side of the street that I saw  
at the same time. \* \* \* The witness on the north side  
telling. \* \* \* It is reported immediately by the  
telling to King all throughout the night from the action and he  
was not so far as the witness and he was not. And it was telling  
at the time of the collision.

The two given instructions returned 204, offered by  
plaintiff, are Nos. 1 and 2. Instruction No. 1 reads as follows:

"1. The jury are instructed that if you find from the  
evidence, under the instructions of the court, that the defendant  
was a driver in the automobile in which he was driving, and that  
he had no control over the operation of said automobile, and if  
you further find from a preponderance of the evidence that at  
the time of the collision of the automobile with the witness's  
and before the time of the collision of the automobile with the  
witness's, the defendant was in the control of the  
said car and was driving it, and if you further find from  
the evidence that the injury and death of the witness  
was caused as a proximate result of the negligence of the  
defendant, it will be your duty to find that the  
defendant was negligent and that the injury and death of the  
witness was caused as a proximate result of the negligence of the  
defendant, and that the injury and death of the witness was  
caused as a proximate result of the negligence of the defendant, and  
that the injury and death of the witness was caused as a proximate  
result of the negligence of the defendant, and that the injury and  
death of the witness was caused as a proximate result of the  
negligence of the defendant." (Given.)"

While the right of a similar instruction might not be  
considered an error in some cases, we are of the opinion that  
under the particular evidence in the present case the giving was  
prejudicial to defendant in that it tended to mislead and confuse  
the jury. It was an essential part of plaintiff's case to prove  
that at and immediately before the time of the collision defendant  
was in the control of the automobile and was driving it. (See v.  
Holt, 194 Ill. 219, 207; See v. City of Peoria, 203 Ill. 207, 211.)  
As said in the case, defendant "had the power of management  
because that defendant was in the exercise of the care and control  
of his car at the time of the collision which resulted in  
the death of the witness at plaintiff's residence, and that  
the defendant was responsible for the injury and death of the witness  
as a proximate result of the negligence of the defendant." In

the present case there was no evidence as to what Wibelmann said or did at or immediately before the time of the accident, or that he said or did anything at all. And we think that it was error for the court to give an instruction to the jury which told them, in effect, that although Biere (the driver of the automobile) might be guilty of negligence, still Wibelmann (who sat on the front seat alongside the driver) might not be, in a case where there was absolutely no evidence that at the time Wibelmann said or did anything at all. The giving of a similar instruction, in a case where the facts were similar, was held to be error in Don v. Fryer, supra.

The other instruction, No. 3, is as follows (*italics ours*):

"3. Whether the deceased was guilty of contributory negligence was a question of fact to be passed upon by the jury, and while the burden of proof was upon the plaintiff to show that the deceased was in the exercise of due care for his own safety, it did not devolve upon the plaintiff to establish such due care by direct and positive testimony, but such due care might be inferred from all the circumstances or evidence, if any, of facts shown to exist prior to and at the time of the injury, and in determining such question the jury might properly take into consideration the instincts prompting to the preservation of life and avoidance of danger."

It is our opinion that the giving of this instruction also constituted error prejudicial to defendant. This is not a case where there were no eyewitnesses to the accident, but one where several such witnesses testified to the details thereof. As stated in the Don case, supra, plaintiff "had the burden of affirmatively showing that deceased was in the exercise of due care and caution for his own safety at the time of the accident which resulted in his death," etc. The instruction told the jury, in effect, that although there may have been no direct and positive testimony of the exercise of due care on Wibelmann's part, still they might find that he was in the exercise of such care by taking into consideration the "instincts prompting to the preservation of life and avoidance of danger." Such an instruction cannot be considered proper under the evidence in the present case







and where eyewitnesses testified to the details of the accident. And, as we read it, the instruction virtually told the jury that such inaction of Ribbelman obviated the necessity of plaintiff making proper proof of Ribbelman's due care for his own safety at and immediately before the time of the accident, and thereby misled the jury.

Counsel for defendant, in their written answer to plaintiff's petition for rehearing, repeat their contention (made in their original brief and argument) that this court should not remand the cause but here enter final judgment against plaintiff, because the evidence introduced upon the trial did not sufficiently show negligence on the part of defendant's servants in operating the locomotive, or the exercise of due care for his own safety on the part of the deceased, Ribbelman. We are of the opinion that this is such a case as suggests that in the interests of justice plaintiff should be given an opportunity of having another trial of the issues, if it so desires.

For the errors of the trial court in giving to the jury the two above <sup>mentioned</sup> instructions the judgment of the circuit court is reversed and the cause remanded.

REVERSED AND REMANDED.

Sullivan, F. J., and Scanlan, J., concur.

and where opportunity afforded to the details of the accident.  
and so on and so forth, the transaction actually took place  
such incident of accident occurred the necessity of instantly  
being proper proof of accident, the case for his own safety  
and immediately before the time of the accident, and thereby  
related the injury.

Conceded for defendant, in their written answer to  
plaintiff's petition for judgment, upon their counterclaim, that  
in their original brief and argument, they have shown that  
because the same was then with them, judgment against plaintiff  
because the evidence introduced upon the trial did not sufficiently  
show negligence on the part of defendant, nor negligence in operating  
the locomotive, or the exercise of due care for his own safety on  
the part of the deceased, defendant, as one of the parties who  
this is not a case of negligence, but in the exercise of due  
diligence should be given an opportunity of having another trial  
of the issue, it is an accident.

For the reason of the trial court in favor of the jury  
mentioned  
the two counterclaims for judgment of the district court in  
favor of the same parties.

THE COURT AND JURY.

Witness: J. L. and J. L., J. L.

36955

CLARENCE KIEWERT, by Charles  
L. Kiewert, his father and  
next friend,

Appellee,

v.

J. O. STOLL COMPANY, a  
corporation, (impleaded  
with Robert H. Ginter),  
Appellant.

1074  
APPEAL FROM SUPERIOR  
COURT OF COOK COUNTY.

274 I.A. 669<sup>2</sup>

MR. JUSTICE CHIDLEY DELIVERED THE OPINION OF THE COURT.

On April 22, 1933, plaintiff recovered a judgment for \$5,000, following the verdict of a jury, against the J. O. Stoll Company, a corporation (hereinafter called the Stoll Co.,) in an action for damages for personal injuries, received in an automobile accident on the afternoon of October 7, 1931, on Addison Street (an east and west street) near its intersection with Occoia avenue (a north and south street) in Chicago. By this appeal the Stoll Co. seeks to reverse the judgment.

The action was originally commenced against Robert H. Ginter, as sole defendant, on December 4, 1931. In the original declaration, consisting of one count, plaintiff alleged that on the day named he, a minor of six years of age and in the exercise of ordinary care for his own safety, "was crossing Occoia avenue at or near its intersection with Addison street;" that Ginter was the owner of an automobile which he permitted his 13-year old son (Harry Ginter) to drive; and that Ginter by his son so carelessly drove the automobile that it then and there struck plaintiff and seriously and permanently injured him.

On January 8, 1932, plaintiff was granted leave to make





the Stoll Co. an additional party defendant and to file an amended declaration. This declaration consisted of two counts. In the first it is alleged that on October 7, 1931, Ginter owned and controlled an automobile, kept by him for the pleasure and convenience of his family and which was then being driven by his minor son, of the age of 17 years, on a certain mission with his consent; that the Stoll Co. owned and controlled a certain other automobile which was then being driven and operated by one of its agents "on and along Addison street, at and near its intersection with Onocola avenue;" that plaintiff, a minor of seven years of age and in the exercise of ordinary care for his own safety at the time, was lawfully "crossing the street at or near the intersection of Addison street and Onocola avenue;" that defendants (Ginter and Stoll Co.) then and there "so negligently and improperly controlled, operated and managed their respective automobiles that \* \* plaintiff was caused to and did fall with great force and violence upon the street," and then and there sustained serious and permanent injuries; to his damage, etc. In the second count the negligence charged is that, at the time and place and while plaintiff was lawfully crossing the street, defendants negligently operated their respective automobiles "at a greater rate of speed than allowed by the statutes of the State of Illinois and by the ordinance of the City of Chicago."

To this declaration Ginter filed a plea of the general issue and a special plea denying ownership, operation or control of the automobile, "which is alleged to have injured plaintiff." The Stoll Co. filed a plea of the general issue and also a plea denying its ownership, operation or control of the automobile "as set forth in plaintiff's declaration."

The cause was called for trial before a jury on the issues made by the above pleadings on April 10, 1933, and, after several witnesses had testified in plaintiff's behalf, plaintiff

the Wall No. an additional party defendant and so this on numbered  
specification. This specification consisted of two counts. In the  
first it is alleged that on October 7, 1931, Winter owned and now-  
owned an automobile, kept by him for the pleasure and convenience  
of his family and which was then being driven by his minor son, at  
the age of 14 years, on a certain mission with his consent; that  
the said car owned and operated a certain other person named  
and then being driven and operated by one of his agents "on and  
about certain streets, at and near the intersection with certain  
avenue", that specifically, a minor of seven years of age and in the  
company of another minor was then and being on the street, was  
lawfully "driving the street" as was the investigation of certain  
street and house owners, that defendant (Winter and his son)  
then and there "so negligently and recklessly controlled, operated  
and caused their respective automobiles that" - "specifically and  
caused to and did fall upon and against and damage upon the  
persons" and then and there mentioned names and persons in the  
vicinity of his house; that in the present count the negligence  
charged in this, at the time and place and while defendant was  
lawfully driving the street, defendant negligently operated their  
respective automobiles "so a negligent and at speed that caused by  
the driving of the same of Winter and by the negligence of the  
City of Chicago".

To this specification Winter filed a plea of the general  
issue and a special plea denying negligence, operating as matter  
of the automobile, "which is alleged to have injured himself".

The Wall No. filed a plea of the general issue and also a plea  
denying the existence of negligence as charged in the specification "as  
and found in plaintiff's declaration".

The case was called for trial before a jury on the  
issues made by the above findings on April 10, 1932, and after  
extensive argument and testimony in plaintiff's behalf, plaintiff



dismissed the cause as to defendant, Robert H. Dinter, and the Stoll Co. withdrew its said special plea, and plaintiff was granted leave to file by the following morning a second amended declaration against the Stoll Co., as sole defendant.

On April 11, 1933, this second amended declaration was filed, to which the Stoll Co. immediately filed a plea of the general issue and also a special plea, alleging that, at the time and place of the claimed grievances, it "did not own, operate or control said automobile as set forth in plaintiff's declaration." During the same day plaintiff introduced further evidence and rested. Thereupon the Stoll Co. moved for a directed verdict in its favor, but the motion was denied, and, after the Stoll Co. electd not to introduce any evidence, the case went to the jury under certain given instructions offered by the respective parties. On April 12, 1933, the jury returned the following verdict: "We find defendant, J. O. Stoll Co., guilty, and assess plaintiff's damages at the sum of \$5,000." After motions for a new trial and in arrest of judgment had been overruled, the court entered the judgment against the Stoll Co. as first above mentioned.

Said second amended declaration, on which with the two pleas of the Stoll Co. thereto the case went to the jury, consists of two counts. The allegations of the first are substantially as follows:

That on October 7, 1931, the Stoll Co. was possessed, had control of and was operating a certain automobile in a westerly direction upon and along Addison street, near its intersection with Osceola avenue; that it was its duty, in the operation of the automobile, to have due regard to the rights and safety of all persons lawfully upon said street, and to propel the automobile "to the right of the center line of said street;" that on the day named, while plaintiff, as a pedestrian and in the exercise of due care for one of his tender years, was lawfully crossing Addison street in a northerly direction, defendant, by its agent, "negligently" drove said automobile in Addison street, and "suddenly turned" it from the north side to the south side of said street, near its intersection with Osceola avenue, without giving any warning to other vehicles approaching from the opposite direction, in violation of the statute of





Illinois concerning motor vehicles; that, as "the direct and proximate cause of defendant's said negligence," defendant "then and there caused another automobile, which was being run and operated in an easterly direction, to swerve from its course and to run into and over plaintiff with great violence;" that thereby plaintiff sustained a broken leg and was otherwise seriously and permanently injured; to his damage, etc.

The particular negligence charged in the second count of said declaration is as follows:

"That said defendant, by its agent, not regarding its duty in the premises, so negligently and improperly parked the front of its automobile in a southwesterly direction, at an angle other than parallel with the edge of the roadway, and had it in a direction other than the direction of the traffic and not with the curb side of the vehicle within six inches of the roadway, as provided in section 2018, Article 6, of the Traffic and Vehicle Ordinance of the Revised Chicago Code of the year 1931, which said section provides as follows:

"No vehicle shall be parked with the left side of said vehicle next to the curb, and it shall be unlawful to stand or park any vehicle in a roadway other than parallel with the curb and with the two right wheels of the vehicle within six inches of the regularly established curb line, except that upon those streets which have been marked for angle parking, as provided in this section, vehicles shall be parked at the angle to the curb indicated by such marks."

"And, as a direct and proximate result thereof and in consequence of the violation of defendant by its agent, then and there caused the view of the driver of a certain other automobile, approaching from the easterly direction, to become so obstructed that said driver failed to observe plaintiff, who was then and there crossing said public highway as aforesaid at a point immediately to the east of defendant's automobile parked as aforesaid, and thereby the driver of said other automobile ran against and over plaintiff with great violence," etc.

On the trial plaintiff's witnesses, as to the details of the accident and the physical surroundings, were Alex Newton, Harry Ginter and John A. Smith, and each was examined and cross-examined at considerable length. It appears from their testimony in substance that on the southeast corner of Addison street and Cassola avenue (otherwise known as 74th Court) there was a drug-store, and east thereof on Addison street was a barber shop, facing north, of which the witness, Newton, was the proprietor and who witnessed the accident; that Addison street, running east and west, was paved with cement, but that between the cement pavement and the south sidewalk there was a dirt pavement, or "shoulder," about 15 feet in width, in which it was customary to park automobiles and auto-



[illegible]

of this decision as follows:

There was no evidence of any other persons being present at the time of the shooting. The only person seen by the witness was the man who shot her.

1. The vehicle shall be loaded with the load side of the vehicle toward the rear of the vehicle. The load shall be secured in the vehicle in a manner that will prevent the load from shifting or falling out of the vehicle during transport. The load shall be secured in the vehicle in a manner that will prevent the load from shifting or falling out of the vehicle during transport. The load shall be secured in the vehicle in a manner that will prevent the load from shifting or falling out of the vehicle during transport.

[illegible][illegible]

trucks; that just prior to the accident somebody's truck was parked on the south side of Edison street, about in front of the barber shop, at an angle, with its front wheels facing southwesterly; that no part of any of the wheels of the truck rested upon the cement pavement; that practically all, if not all, of the truck was within and over the dirt "shoulder;" that at the time of the accident some children, coming from school, were crossing Edison street; that Harry Ginter, a boy of about 17 years of age, was driving his father's automobile easterly on Edison street; that just after he had crossed Osceola avenue and was continuing to move easterly on Edison street with his left wheels "partly over the center line of the road," plaintiff, a boy about six years of age and on his way home from school, suddenly appeared from behind the parked truck; and that in attempting to cross the street he was struck by the Ginter automobile and injured. Neither of plaintiff's two witnesses, Newton or Ginter, was able to positively identify the parked truck as being one owned or operated by defendant, Stoll Co. Subsequently, during the trial, John A. Smith, the driver of a truck of defendant was called as plaintiff's witness, and he testified in substance that shortly prior to the accident he drove defendant's truck easterly on Edison street; that upon reaching Osceola avenue he turned to the south and, passing the southwest corner of the two streets, parked the truck, facing south, on the west side of Osceola avenue, just south of Edison street; that the Stoll Co. is in the magazine business; that after so parking his truck he delivered some magazines to the drug store on the southeast corner; and that after the delivery of the magazines he witnessed the happening of the accident. His testimony was contradictory in some particulars, especially as to the place from which he witnessed the accident - whether from the southeast or the southwest corner of the two streets.







After a careful review of the evidence and of the briefs and arguments of opposing counsel, we have reached the conclusion that the judgment appealed from should not be allowed to stand and that there should be another trial of the case. In view of the pleadings and evidence, there are two major issues involved, viz: (1) Whether any truck owned or operated by defendant was in any way involved in the accident, and (2), even if it be conceded that a truck of defendant was negligently and improperly parked on Addison street in front of the barber shop in the manner shown, whether such truck, so parked, proximately caused or contributed to the accident and to plaintiff's injuries. On both of these issues, in our opinion, the verdict is not sufficiently sustained by the evidence.

In view of our holdings as above, it is unnecessary for us to discuss defendant's counsel's further contentions, (1) that the court erred in giving to the jury certain instructions offered by plaintiff; (2) that the damages awarded by the jury are greatly excessive; and (3) that certain stated conduct of the judge during the trial was prejudicial to defendant.

After the transcript of the record was here filed, plaintiff moved to strike certain parts of it, and the motion was reserved to the hearing. It is now denied.

The judgment of the Superior court of April 22, 1933, is reversed and the cause is remanded.

REVERSED AND REMANDED.

Sullivan, P. J., and Scanlan, J., concur.

After a careful review of the evidence and of the prints and negatives of appearing counsel we have reached the conclusion that the judgment appealed from should not be affirmed as sound and that there should be another trial of the case. As we also find the evidence and evidence there are two major issues involved, viz: (1) Whether any trunk owned or operated by defendant was in any way involved in the accident, and (2), even if it be conceded that a trunk of defendant was negligently and improperly parked on addition street in front of the barber shop in the manner shown, whether such trunk, as alleged, constituted a proximate cause of the accident and the plaintiff's injuries. On both of these issues, in our opinion, the verdict is not sufficiently sustained by the evidence.

In view of our findings as above, it is unnecessary for us to discuss defendant's counsel's further contentions. (1) That the court erred in giving to the jury certain instructions offered by plaintiff; (2) That the damages awarded by the jury are excessive; and (3) That certain stated content of the judge during the trial was prejudicial to defendant.

After the transcripts of the record are here filed, plaintiff may file a motion to set aside the verdict and the court may direct to the jury. It is so ordered. The judgment of the district court is set aside, and the case is remanded.

WILLIAM J. B. and Justice, J. J. Justice.

37011

GEORGE D. WAY,  
Appellee,

v.

ILLINOIS POWER AND LIGHT  
CORPORATION,  
Appellant.

APPEAL FROM SUPERIOR  
COURT, COOK COUNTY.

274 I.A. 669<sup>3</sup>

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action for damages for personal injuries received by plaintiff in an automobile accident on August 6, 1931, in the city of Urbana, Champaign county, Illinois, there was a trial before a jury in the superior court of Cook county during June, 1933, resulting in a verdict in plaintiff's favor for \$35,000. On July 7, 1933, the court, after overruling defendant's motion for a new trial, entered judgment on the verdict against defendant in said sum and the present appeal followed.

Plaintiff's declaration consisted of two counts, to which defendant filed a plea of the general issue. During the trial plaintiff withdrew the second count. In the first count, as amended, plaintiff averred in substance that on August 6, 1931, defendant, an Illinois corporation, was engaged in the operation upon certain streets in the City of Urbana of motor vehicles, commonly called busses; that one of the streets upon which the busses ran was Indiana avenue (an east and west street), which intersected Orchard street (a north and south street) practically at right angles; that on the day mentioned plaintiff, exercising due care for his own safety, was driving his automobile on Orchard street in a northerly direction towards and across its intersection with Indiana



4173

THE UNIVERSITY OF CHICAGO

1941-1942

WILLIAM H. HARRIS  
JAMES H. HARRIS

600.4.1.452

TURNED BY THE BUREAU OF THE NATIONAL BUREAU OF INVESTIGATION

As an action for damages the plaintiff is entitled to recover in addition to an economic loss an amount of \$1000 in the case of physical damage to the property. The plaintiff is entitled to recover a sum of \$1000 in the case of physical damage to the property. The plaintiff is entitled to recover a sum of \$1000 in the case of physical damage to the property.

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The process of urbanization is the movement of people from rural areas to urban areas. This movement is caused by a number of factors, including the search for better living conditions, the desire for education and employment opportunities, and the attraction of urban areas by the concentration of industry and commerce.

Alfreda Brown and Anne Lee Johnston also living.

avenue; that then and there defendant so negligently drove and operated one of its busses in a westerly direction upon Indiana avenue toward and across its intersection with Orchard street that it collided with plaintiff's automobile within the intersection, and plaintiff was violently thrown against the interior of his automobile and out upon the street and sidewalk; and that as a direct result of defendant's negligence plaintiff was seriously and permanently injured, etc.

As to details of the accident, which occurred about 8 o'clock on the morning of a clear day and when the streets were dry, plaintiff testified at considerable length both on direct and cross examination, and several other witnesses called by him also gave testimony. Defendant's principal witness was the driver of the bus and his testimony was corroborated by that of several passengers in the bus at the time. Some of the physical facts, as disclosed from the evidence, are as follows: Orchard street, running north and south, is 25 feet, 3 inches, wide from curb to curb, and Indiana avenue, running east and west, is 23 feet, 3 inches, wide. Between the curbs and the sidewalks there are parkways of varying widths. In the parkway at the northwest corner of the intersection stood a cedar telephone pole; it was 6-1/2 feet north of the north curb line of Indiana avenue and about 8 inches west of the west curb line of Orchard street. Defendant's bus was 30 feet, 6 inches long and weighed 11,800 pounds. Plaintiff's automobile was an 8-cylinder, 2-passenger coupe, with a length over-all of about 15 feet, and weighed about 3,600 pounds. A plat of the intersection (offered by plaintiff and admitted in evidence, and drawn to the scale of 1/10th of an inch equalling 1 foot) discloses that there was no building standing at the southeast corner of the intersection close to either of the streets, so that an automobilist approaching the intersection on Orchard street from the south had practically no

and that there was no significant evidence that the car was involved in the accident. The car was found in a position which indicated that it had been involved in a collision with the truck. The car was found in a position which indicated that it had been involved in a collision with the truck. The car was found in a position which indicated that it had been involved in a collision with the truck.

It is also noted that the car was found in a position which indicated that it had been involved in a collision with the truck. The car was found in a position which indicated that it had been involved in a collision with the truck. The car was found in a position which indicated that it had been involved in a collision with the truck.

As to the details of the accident, which occurred about 8 o'clock on the morning of a clear day and when the streets were dry, Plaintiff testified at considerable length both on direct and cross examination, and several other witnesses called by him also gave testimony. Defendant's principal witness was the driver of the bus and his testimony was corroborated by that of several passengers in the bus at the time. Some of the physical facts as disclosed from the evidence, are as follows: Orchard Street, running north and south is 33 feet 3 inches wide from curb to curb, and Indiana Avenue, running east and west is 22 feet 3 inches wide. Between the curbs and the sidewalks there are pavements of varying widths. In the gateway at the northwest corner of the intersection stood a modern telephone pole; it was 10 1/2 feet north of the north curb line of Indiana Avenue and about 3 inches west of the west curb line of Orchard Street.

Plaintiff's car was 12 feet 6 inches long and weighed 11,500 pounds. Plaintiff's automobile was an 8-cylinder, 2-passenger model, with a top, overall of about 18 feet, and weighed about 1,500 pounds. A list of the witnesses (offered by Plaintiff) and admitted in evidence, and given in the order of an oral examination (test) discloses that there was no collision between the car and the truck at the intersection close to the curb of the street, so that no defendant appearing in the intersection on Orchard Street from the south had practically no



obstruction to his view for a considerable distance of vehicles approaching the intersection on Indiana avenue from the east, and vice-versa.

Plaintiff was about 46 years of age and a physician and surgeon, practicing in the City of Urbana. His version of the accident, as testified to on direct examination, is in substance as follows:

Leaving his garage, which was on Orchard street and south of its intersection with Michigan avenue (one block south of Indiana avenue), he drove his car northerly on Orchard street at a speed of "about 17 or 18 miles an hour." As he approached Indiana avenue and "was about 40 or 45 feet from the intersection" he "noticed the bus coming from the east on Indiana avenue." When he "first noticed the bus it was 90 to 100 feet from the intersection." When he was about 45 feet from the intersection he was operating his automobile about 18 miles per hour and he "began to slow down," and when he was about 30 feet from the intersection he was moving "possibly 13 or 14 miles an hour" and the speed of the bus was "about 25 miles an hour." As he approached the intersection he noticed that the bus "began slowing down when it was about 30 feet from the intersection," that it "drew over to the north side of the street towards the curb," and that he (plaintiff) was then "at the side-walk on the south side of Indiana avenue and going not to exceed 15 miles an hour." That when he saw the bus slowing down and turning in towards the curb he "started to cross the intersection and continued going." That when he was "about 10 or 12 feet out in the intersection the bus picked up speed rapidly, straight ahead," that he "sounded his horn and tried to get across;" that there "was a car coming from the north going south" and he "could not turn to the left;" that "when the bus hit my car it hit the fender and the rear bumper on the right hand side;" and that "the next thing I knew I was in the hospital."

On cross-examination plaintiff testified in part as follows:

"The distance from my garage to Indiana avenue is about 325 feet \* \* My brakes were in good working condition that morning \* \* When I first saw the bus coming into the intersection, I was about 45 feet south of the intersection \* \* The left rear hub of my car hit the telephone pole, \* \* I think I said previously that the telephone pole was split up a few feet from the ground; I think I said they replaced the pole. \* \* When I first saw the bus down in Indiana street east of the intersection, it is my judgment that it was going 25 miles an hour. \* \* Just before it reached the intersection it had slowed down to 4 or 5 miles an hour. \* \* When it came into the intersection it came in with a bound. He put on gas.

Q. Why were you watching that bus so closely at that time, Doctor?

A. Why was I?

Q. Yes.

A. Well, it was a regular cross street for the bus





and I always approached that corner with the thought in mind that there would be a bus coming along; and then his rate of speed, I figured he would reach the intersection before I would if I kept up the same speed I had been going, about 17 or 18 miles an hour; and then there was a car coming from the north.

I don't know who was in that car coming from the north. I don't know what became of it. I am absolutely sure there was a car coming from the north. It was a little, light sedan. I don't know what make it was; I did not look at it directly, but it was in my mind; I could see it was coming along there. I was right at Michigan avenue when I first observed it; that is a block from the point of the accident. This other car was fully a block down the street; I had a clear view all the way down Orchard street, and this automobile was coming toward me on Orchard street."

Defendant's witness, J. B. Conover, 52 years of age and the driver of the bus, testified on direct examination in part as follows:

"I have been in the employ of defendant in Champaign and Urbana since 1909, as a bus driver and street car motorman. \* \* \* The last time I had stopped the bus prior to the accident was at the intersection a block east of Orchard street, when a passenger (Mrs. Wilson) got on the bus. \* \* \* I then proceeded west on Indiana avenue, and in the middle of the block I probably was going 18 to 20 miles an hour, and I continued at that rate of speed until about 20 feet east of Orchard street. \* \* \* I then slowed down to probably 12 miles per hour, because there is a raised crossing with a 'bump' in it on the north half of Indiana avenue. \* \* \* The bus was travelling probably 4 feet out from the north curb line of the avenue. \* \* \*. I did not at any time gull toward the curb. \* \* \* As I approached Orchard street I looked both to my left and to my right for traffic coming and saw nothing. \* \* \* Just about the time my front wheels had hit the east curb line of Orchard street my eyes caught an automobile at my left coming from the south, going north. \* \* \* At that time the automobile was probably 20 or 25 feet south of the south curb line of Indiana avenue. Just the instant I saw him I applied my brakes. \* \* \* This automobile swerved to my left, around in front of me and about in the middle of the intersection, and its rear fender was struck by the right half of the bumper of the bus. This automobile had kept the same speed. I never noticed him slowing up a bit. He hit the telephone post on the northwest corner, which threw him out of the deer which came open for some reason. \* \* \* He struck his head \* \* \* on the curb. \* \* \* This automobile began to swerve just about the time I saw him, when he was probably 20 feet or so from the curb line; it swung to the west around in front of my bus this way (indicating). \* \* \* There was not any other car, prior to or at the time of the accident, that approached the intersection from the north. \* \* \* As I approached Orchard street I did not make any shift in gears; no shift in gears was made until after the accident. \* \* \* The brakes on my bus were in a No. 1 condition. \* \* \* At the time the bus hit the automobile, it was going very slow, \* \* \* moving not over a mile an hour. After the impact I shifted back into second and pulled across \* \* \* until the front end of my bus was just about at the west crossing, where the people cross, on Indiana avenue \* \* \* When I first saw Dr. Ray's automobile, \* \* \* my best judgment is he was going 45 miles per hour, and





there was no change in that speed as he swerved in front of the bus."

Plaintiff's witness, Cecelia Abby, a passenger in the bus seated on its right hand side, testified that she did not see the automobile before the collision; that she "heard a woman scream and at the same instant the crash came;" that "the bus driver jumped up and says 'Where did that car come from; I heard someone scream, but I did not see the car,' or words to that effect;" and that she got off the bus and thereafter rendered assistance to plaintiff until an ambulance came.

Plaintiff's witness, W. J. Rankin, also a passenger on the bus, seated "on the front seat right up by the door on the right hand side," testified that as the bus neared the intersection its speed had been lessened to "about 5 miles per hour;" that as it entered the intersection its speed was "considerably" increased; that he did not see the automobile until it was "directly in front" of the bus; that it was then "east of the middle of the street and within probably 5 feet of the east curb;" that he saw the bus strike the car; that "the front of the right front tire struck the car;" that the car "slid to the west and when the wheels struck the curbing the top toppled over against a pole - striking it just back of the door of the car;" that the door came open and a man fell out; that he (the witness) left the bus and discovered that the man was Dr. Way; and that when the ambulance came the Doctor was still in an unconscious condition.

Plaintiff's witness, Roy E. Freeman, formerly a judge of the county court, testified that he lived at the southeast corner of the intersection; that his residence building stood about 30 feet back of both curb lines of the streets; that his attention was attracted by a crash and he immediately went to the scene of the accident; that "the bus was partly within the





intersection, with the front of the bus, headed west, beyond the curb line and perhaps even with the sidewalk running north and south;" that he noticed the condition of the telephone pole, which had been cracked; that near the bottom of the pole, about 12 inches above the ground, there was a deep impression on it,  $1/2$  to  $3/4$  of an inch deep, where it had been treated with tar or creosote; and that "on the left hub of the automobile there was a black substance of tar or creosote on the hub cap."

Plaintiff's witness, Theron Roberts, manager of a garage and repair shop, who towed the automobile away and afterward made repairs on it, testified that when he first saw the car it was at the northwest corner of the intersection, next to the west curb of Orchard street and facing north; that its rear end was near the sidewalk and "we had to lift up the back end in order to tow it;" that the car was near the telephone pole; that he "noticed that the hub cap of the rear wheel had smashed into the telephone pole and the imprint of it was on the pole;" that where the imprint was there was creosote or tar on the pole and "the left rear hub cap had creosote or tar on it;" that the right rear fender was damaged and the rear bumper had been "marked up;" that the left rear fender was smashed and the two rear wheels were badly bent; and that the left door was torn off its hinges.

Defendant's witness, Mrs. Bessie Wilson, who boarded the bus one block east of the intersection, testified that at the time of the accident she was seated "three seats back on the right side of the bus;" that as it approached the intersection it was traveling about in the middle of the street at a "moderate rate of speed;" that as she looked out of the window she saw "an automobile coming north from Michigan avenue;" that it was coming at a "pretty quick speed" and "going faster than the bus;" that at this time "the bus had gotten to about the east line of Orchard street;" that as

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$\frac{d}{dt} \left( \frac{1}{\rho} \right) = - \frac{1}{\rho^2} \frac{d\rho}{dt}$

...and it was found that the ...

30 January 1964. A new record. History and record of the day.

before and let it settle, and then to 25 cc. of 5% NaOH.

and I have had to deal with the fact that I have not been able to get the same results as I have in the past.

"...and that will be necessary to get the committee to get a new one."

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— 200 —

may still not result in more land sufficient, if no serious steps are

It was in the summer of 1961 that the first of the

See next page for full article. See next page for full article. See next page for full article.

values of the model are not as good as the values of the model with the same number of parameters.

all four values estimated with the same data set and all four values are

with ideal locations and forests were still to be considered ideal forest land.

Source: Author's calculations based on data from the 1990 Census of the United States.

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more money and time. With the aid of a computer, the cost of the test was reduced to \$100,000.

NAME \_\_\_\_\_

Journal of Management Education 32(10) 1039-1050

...and the most common that will not be used.

with National Park Service, 1994; 1995; 1996; 1997; 1998; 1999; 2000; 2001; 2002; 2003; 2004; 2005; 2006; 2007; 2008; 2009; 2010; 2011; 2012; 2013; 2014; 2015; 2016; 2017; 2018; 2019; 2020; 2021; 2022; 2023; 2024; 2025; 2026; 2027; 2028; 2029; 2030; 2031; 2032; 2033; 2034; 2035; 2036; 2037; 2038; 2039; 2040; 2041; 2042; 2043; 2044; 2045; 2046; 2047; 2048; 2049; 2050; 2051; 2052; 2053; 2054; 2055; 2056; 2057; 2058; 2059; 2060; 2061; 2062; 2063; 2064; 2065; 2066; 2067; 2068; 2069; 2070; 2071; 2072; 2073; 2074; 2075; 2076; 2077; 2078; 2079; 2080; 2081; 2082; 2083; 2084; 2085; 2086; 2087; 2088; 2089; 2090; 2091; 2092; 2093; 2094; 2095; 2096; 2097; 2098; 2099; 2100; 2101; 2102; 2103; 2104; 2105; 2106; 2107; 2108; 2109; 2110; 2111; 2112; 2113; 2114; 2115; 2116; 2117; 2118; 2119; 2120; 2121; 2122; 2123; 2124; 2125; 2126; 2127; 2128; 2129; 2130; 2131; 2132; 2133; 2134; 2135; 2136; 2137; 2138; 2139; 2140; 2141; 2142; 2143; 2144; 2145; 2146; 2147; 2148; 2149; 2150; 2151; 2152; 2153; 2154; 2155; 2156; 2157; 2158; 2159; 2160; 2161; 2162; 2163; 2164; 2165; 2166; 2167; 2168; 2169; 2170; 2171; 2172; 2173; 2174; 2175; 2176; 2177; 2178; 2179; 2180; 2181; 2182; 2183; 2184; 2185; 2186; 2187; 2188; 2189; 2190; 2191; 2192; 2193; 2194; 2195; 2196; 2197; 2198; 2199; 2200; 2201; 2202; 2203; 2204; 2205; 2206; 2207; 2208; 2209; 2210; 2211; 2212; 2213; 2214; 2215; 2216; 2217; 2218; 2219; 2220; 2221; 2222; 2223; 2224; 2225; 2226; 2227; 2228; 2229; 2230; 2231; 2232; 2233; 2234; 2235; 2236; 2237; 2238; 2239; 2240; 2241; 2242; 2243; 2244; 2245; 2246; 2247; 2248; 2249; 2250; 2251; 2252; 2253; 2254; 2255; 2256; 2257; 2258; 2259; 2260; 2261; 2262; 2263; 2264; 2265; 2266; 2267; 2268; 2269; 2270; 2271; 2272; 2273; 2274; 2275; 2276; 2277; 2278; 2279; 2280; 2281; 2282; 2283; 2284; 2285; 2286; 2287; 2288; 2289; 2290; 2291; 2292; 2293; 2294; 2295; 2296; 2297; 2298; 2299; 2300; 2301; 2302; 2303; 2304; 2305; 2306; 2307; 2308; 2309; 2310; 2311; 2312; 2313; 2314; 2315; 2316; 2317; 2318; 2319; 2320; 2321; 2322; 2323; 2324; 2325; 2326; 2327; 2328; 2329; 2330; 2331; 2332; 2333; 2334; 2335; 2336; 2337; 2338; 2339; 2340; 2341; 2342; 2343; 2344; 2345; 2346; 2347; 2348; 2349; 2350; 2351; 2352; 2353; 2354; 2355; 2356; 2357; 2358; 2359; 2360; 2361; 2362; 2363; 2364; 2365; 2366; 2367; 2368; 2369; 2370; 2371; 2372; 2373; 2374; 2375; 2376; 2377; 2378; 2379; 2380; 2381; 2382; 2383; 2384; 2385; 2386; 2387; 2388; 2389; 2390; 2391; 2392; 2393; 2394; 2395; 2396; 2397; 2398; 2399; 2400; 2401; 2402; 2403; 2404; 2405; 2406; 2407; 2408; 2409; 2410; 2411; 2412; 2413; 2414; 2415; 2416; 2417; 2418; 2419; 2420; 2421; 2422; 2423; 2424; 2425; 2426; 2427; 2428; 2429; 2430; 2431; 2432; 2433; 2434; 2435; 2436; 2437; 2438; 2439; 2440; 2441; 2442; 2443; 2444; 2445; 2446; 2447; 2448; 2449; 2450; 2451; 2452; 2453; 2454; 2455; 2456; 2457; 2458; 2459; 2460; 2461; 2462; 2463; 2464; 2465; 2466; 2467; 2468; 2469; 2470; 2471; 2472; 2473; 2474; 2475; 2476; 2477; 2478; 2479; 2480; 2481; 2482; 2483; 2484; 2485; 2486; 2487; 2488; 2489; 2490; 2491; 2492; 2493; 2494; 2495; 2496; 2497; 2498; 2499; 2500; 2501; 2502; 2503; 2504; 2505; 2506; 2507; 2508; 2509; 2510; 2511; 2512; 2513; 2514; 2515; 2516; 2517; 2518; 2519; 2520; 2521; 2522; 2523; 2524; 2525; 2526; 2527; 2528; 2529; 2530; 2531; 2532; 2533; 2534; 2535; 2536; 2537; 2538; 2539; 2540; 2541; 2542; 2543; 2544; 2545; 2546; 2547; 2548; 2549; 2550; 2551; 2552; 2553; 2554; 2555; 2556; 2557; 2558; 2559; 2560; 2561; 2562; 2563; 2564; 2565; 2566; 2567; 2568; 2569; 2570; 2571; 2572; 2573; 2574; 2575; 2576; 2577; 2578; 2579; 2580; 2581; 2582; 2583; 2584; 2585; 2586; 2587; 2588; 2589; 2590; 2591; 2592; 2593; 2594; 2595; 2596; 2597; 2598; 2599; 2600; 2601; 2602; 2603; 2604; 2605; 2606; 2607; 2608; 2609; 2610; 2611; 2612; 2613; 2614; 2615; 2616; 2617; 2618; 2619; 2620; 2621; 2622; 2623; 2624; 2625; 2626; 2627; 2628; 2629; 2630; 2631; 2632; 2633; 2634; 2635; 2636; 2637; 2638; 2639; 2640; 2641; 2642; 2643; 2644; 2645; 2646; 2647; 2648; 2649; 2650; 2651; 2652; 2653; 2654; 2655; 2656; 2657; 2658; 2659; 2660; 2661; 2662; 2663; 2664; 2665; 2666; 2667; 2668; 2669; 2670; 2671; 2672; 2673; 2674; 26

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As a result, the model is able to capture the effects of the various factors on the dependent variable. The model is also able to capture the effects of the various factors on the dependent variable. The model is also able to capture the effects of the various factors on the dependent variable.

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$\frac{1}{\sqrt{\pi}} \int_{-\infty}^{\infty} f(x) \delta(x-a) dx = f(a)$

and the fact that the model is not a good fit for the data.



the automobile continued to come on "it swerved slightly as it reached the bus;" that she "did not hear any horn or other signal given by the automobile and that she did not see any other automobile coming from the north; that after the collision and after the bus had stopped "she jumped out of the front door of the bus onto the sidewalk \* \* on the west side of Orchard street across Indiana avenue;" that she "cannot tell whether the bus slowed down its speed when it got within 25 feet of the intersection;" but that she "knows that it is not so that when the bus got within 10 or 15 feet of Orchard street it increased its speed."

Defendant's witness, Frieda Retzolk, a passenger in the bus "sitting on the south or left-hand side," testified in part that as the bus was about to enter the intersection she saw Dr. Way's car "coming north" and it was coming "like nobody's business;" that at this time the car was "about half a block away" and it continued on; that it did not sound a horn, and as it entered the intersection it "swerved" and "cut right in ahead of the bus," which was "going rather slow;" that she did not see the actual impact but she "did see him hit the telephone pole, and his car rebounded;" that the bus did not stop at the crossing; that it was traveling about 10 or 12 miles per hour; that just before it reached the intersection, and while crossing it, the bus "was travelling on the north side of the pavement, so that I was sitting about over the center of the road;" that as the bus neared the intersection "it did not pull up to the curb on the right hand side;" that when the collision occurred the witness "did not see any car at all coming from the north on Orchard street;" that the speed of Dr. Way's car was "about 40 miles per hour;" and that "I did not see any change in his speed from the time I saw him until the accident occurred."

Defendant's witness, Mrs. Frank Melbling, a niece of Judge Freeman who previously was called as a witness for plain-





tiff, testified that she was a passenger in the bus, "seated about in the center on the left hand side;" that she first noticed Dr. Ray's car coming north on Orchard street when it was about half a block from the intersection; that he "was coming at what I would say was a high rate of speed;" that he kept on and "swerved in front of and to the west of the bus;" that "from the time I saw it until it got down there, there was no change in the speed of the car;" that she did not hear any signal from the automobile; that "after the accident was over and the bus had stopped, the front door of the bus was even with the west sidewalk of the intersection," and "we got off the bus right onto the sidewalk there;" that there was no other automobile there at the time, and that "I did not see any automobile coming from the north prior to the accident;" that as the bus entered the intersection it was travelling at a "moderate rate of speed," about in the middle of the street; and that the bus "did not pull up to the curb anywhere along there in that block before it got to the intersection."

One of the contentions of defendant's counsel is that the jury's verdict is against the manifest weight of the evidence on the issue of plaintiff's negligence at and immediately before the time of the accident. After a careful review of the entire evidence bearing upon this issue, we are of the opinion that the contention is a meritorious one and that the judgment appealed from, based upon the verdict, should not be allowed to stand. It sufficiently appears that the proximate cause of the collisions and plaintiff's resulting injuries was his negligent disregard of sub-section 2 of section 38 of the Illinois Motor Vehicles Act (Cahill's Stat. 1931, Chap. 95a, par. 34, p. 1950) which reads as follows: "Except as hereinafter provided motor vehicles travelling upon public highways shall give the right-of-way to vehicles approaching along intersecting highways from the right and shall have the right-of-way over those approaching







from the left." And a clear preponderance of the evidence discloses that plaintiff, approaching the intersection in his automobile from the south at an excessive rate of speed, and observing that defendant's bus on his right was proceeding to cross the intersection from east to west at a slow or moderate rate of speed and that it had already entered the intersection, nevertheless so negligently drove his automobile that it continued on with no slackening of speed, and that, in making the attempt to pass in front of the moving bus, a rear portion of the automobile was struck by the bus, whereby and also because of the automobile's excessive speed, it collided with the telephone pole in the roadway at the northwest corner of the intersection. Such being the clear preponderance of the evidence, plaintiff should be considered as being guilty of negligence under frequent decisions of the appellate courts of this district. (Lenarts v. Funk, 234 Ill. App. 180, 185; Partridge v. Eberstein, 225 id. 209, 212-3; Salmon v. Wilson, 227 id. 226, 228; Zarf v. Kitten, 229 id. 406, 408; McCarthy v. Fadin, 236 id. 300, 302-3.) And in view of the evidence we regard it as our duty to reverse the judgment and remand the cause. In Danahson v. East St. Louis, etc. Ry. Co., 235 Ill. 625, 628, it is said: "The constitution which provides that the right of trial by jury as previously enjoyed shall remain inviolate, does not make the jury the final judges of the weight of the evidence, and if a verdict is manifestly against the weight of the evidence, it is the duty of the trial judge to set it aside and grant a new trial, and a failure to do so is error, for which a judgment must be reversed." (See, also Balden v. Imlis, 84 Ill. 73, 79; Fitzgerald v. Chicago, etc. R. Co., 144 Ill. App. 100, 103; Gady v. Grand Trunk, etc. Ry. Co., 251 Ill. App. 513, 522; Baumgaister v. Bowers, 271 Ill. App. 332, 336.)

Another contention of defendant's counsel is that the verdict of the jury of \$35,000 is so grossly excessive as to

From the fact that a direct measurement of the evidence dis-  
closed that testimony regarding the information in his auto-  
mobile from the fact of an excessive rate of speed, and observing  
that defendant's car on his right was proceeding to cross the  
intersection from east to west at a time at which rate of speed  
and that he had directly observed the defendant, notwithstanding he  
negligently drove his automobile that is consistent with the  
classification of speed, and that, in making the attempt to pass in  
front of the moving bus, a rear portion of the automobile was struck  
by the bus, thereby and also damage to the defendant's automobile  
speed, it related with the defendant's point in the vicinity of the  
intersection of the intersection, with being the clear dis-  
position of the evidence, plaintiff should be considered as  
being guilty of negligence under the above decision of the evidence  
of the evidence. (See also People v. Jones, 100 Cal. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 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2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265,

indicate passion and prejudice on the part of the jury. Much of the evidence contained in the present record relates to the nature and extent of plaintiff's injuries, and it is conflicting. From a careful review of it we are convinced that there is substantial merit in counsel's contention. However, as the judgment must be reversed for the reasons above stated, and as the cause may be tried again, it is unnecessary for us to discuss the evidence bearing upon the issue of excessive verdict.

The judgment of the superior court of July 7, 1933, is reversed and the cause is remanded.

REVERSED AND REMANDED.

Sullivan, P. J., and Scanlan, J., concur.



...the evidence contained in the present record relates to the nature and extent of Plaintiff's injuries, and it is concluded from a careful review of it we are convinced that there is substantial basis in evidence for the reasons stated, and as the same may be tried again, it is unnecessary for us to discuss the evidence bearing upon the issue of causation further.

The judgment of the superior court of July 7, 1931,

is reversed and the same is remanded.

WYOMING AND GOWEN.

WILLIAM F. TAYLOR, JUDGE.

37030

ELECTRIC SERVICE ENGINEERING  
COMPANY, a corporation,  
Appellee,

v.

NEW YORK CENTRAL RAILROAD  
COMPANY, a corporation,  
Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

274 I.A. 669<sup>H</sup>

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On May 13, 1933, plaintiff commenced an action in replevin to recover possession of "one Curtis Steam Turbin #23222 and G. E. Generator #2045713," of the claimed value of \$180, and which, as alleged in the affidavit, defendant had wrongfully detained from plaintiff. The bailiff took the property under the writ and delivered it to plaintiff. On June 1, 1933, after defendant had entered its appearance, there was a trial before the court without a jury, resulting in the court "finding the right of property in plaintiff and assessing plaintiff's damages at the sum of \$100." And the court on the same day adjudged that "plaintiff have judgment on the finding and have and retain possession of the property replevied," and further adjudged that "plaintiff have and recover of and from defendant the damages of plaintiff amounting to the sum of \$100, in form as aforesaid assessed, together with costs," etc.

By the present appeal defendant seeks to reverse the second part of the judgment, wherein plaintiff was awarded the sum of \$100 as damages. Defendant's counsel state in their brief here filed that "no issue arises upon the right of plaintiff to the possession of the property; the only question is the

20000

RECEIVED BY THE  
CLERK OF THE COURT  
JANUARY 1, 1934

NEW YORK CENTRAL RAILROAD  
TRUST, a corporation,  
Plaintiff,

IN SENATE  
JANUARY 1, 1934

274 I.A. 688

THE JUDICIAL BRANCH HAS THE HONOR OF THE COURT.

ON MAY 12, 1933, Plaintiff commenced an action in  
 equity to recover possession of "one certain steam locomotive  
 numbered 274 I.A. 688," of the claimed value of  
 \$100, and which, as alleged in the affidavit, defendant had  
 wrongfully obtained from Plaintiff. The billiard took the  
 matter under the writ and delivered it to Plaintiff, on  
 June 1, 1933, after defendant had entered its appearance.  
 There was a trial before the court without a jury, resulting  
 in the court finding the title of property is Plaintiff and  
 ordering Plaintiff's recovery of the sum of \$100, and the  
 court on the same day ordered that Plaintiff have judgment  
 on the finding and have and retain possession of the property  
 registered, and further ordered that Plaintiff have and recover  
 of and from defendant the sum of Plaintiff's damages in the  
 sum of \$100, in full of recovery, together with  
 costs, etc.

By the present appeal defendant seeks to reverse the  
 second part of the judgment, wherein Plaintiff was awarded the  
 sum of \$100 as damages. Defendant's counsel state in their  
 brief more fully that "no issue arises upon the right of Plaintiff  
 to the possession of the property; the only question is the



measure of damages." Plaintiff has not appeared nor filed a brief in this court.

The bill of exceptions discloses that on the trial the parties appeared by their respective attorneys; that plaintiff called two witnesses - Clyde Moore, its president, and E. V. Boreing, a foreman in its employ; but that defendant did not offer any evidence. Moore's testimony, corroborated in part by that of Boreing, is substantially as follows:

On Wednesday morning, May 10, 1933, in company with Boreing, he went to defendant's Taylor Street Warehouse in Chicago and saw W. O. Ferguson, manager for defendant of the warehouse. About 10:30 o'clock, a "turbo-generator" was then offered for sale to the highest bidder. On behalf of plaintiff Moore bid \$150 for the machine and, no other bid being received, the machine was sold to plaintiff for that sum, and Moore gave to Ferguson plaintiff's check, payable to defendant's order for \$150, and in turn Ferguson delivered to Moore defendant's bill of sale to plaintiff of the machine, viz., "1 Curtis Steam Turbin #23222, and E. V. Generator, #2605713" (bill of sale introduced in evidence.) Ferguson said that plaintiff could not take the machine away until he had had the check certified, and Moore then told Ferguson "to hold the machine until the next morning," when plaintiff "would then come and get it." Ferguson said "all right," and at the time delivered to Moore a "slip authorizing the removal of the machine by plaintiff from the warehouse." On Thursday morning, May 11th, Moore employed a "cartage concern, doing business as A. Mustad, to go and get the machine," and Mustad, Boreing and four of plaintiff's employees went to the warehouse with Mustad's truck for that purpose, but later returned and informed Moore that defendant had refused to deliver up the machine." On the following morning (May 12th) Moore sent Boreing and four of plaintiff's employees to the warehouse to get the machine, and upon Boreing's demand defendant again refused to deliver the machine. Later in the day Moore and Boreing attended a meeting at the office of J. P. Patterson, defendant's assistant freight traffic manager, at defendant's Chicago depot. Other agents of defendant and defendant's attorney were present, as were Edward Koller and Maurice Davis, who claimed that an option had been given to them by defendant to purchase the machine. After much discussion Patterson said that defendant would later decide to whom the machine would be delivered, but no announcement of the decision was made. On Saturday morning, May 13th, Moore interviewed defendant's attorney, L. Moore-Jones, and demanded information as to when defendant would deliver the machine to plaintiff. The attorney said that Patterson had gone out of town Friday evening without leaving any instructions as to what disposition of the machine should be made, and requested Moore to "wait until Monday morning when Patterson would return." Moore refused the request and during the afternoon of May 13th the present replevin suit was commenced and the property was taken under the writ and delivered to plaintiff.





Moore also testified, over defendant's objection, as to moneys paid by plaintiff to Husted for the use of his truck on May 11th and 12th, and as to moneys paid to Boreing and plaintiff's four employees for their time expended in making their fruitless trips to the warehouse on that day (shop slips exhibited); also as to moneys paid by plaintiff to Husted for use of his truck, and to Boreing and said four employees for overtime on Saturday afternoon, May 13th, in procuring the machine under the writ and taking it to plaintiff's warehouse. The various sums so paid totalled \$125.75, of which total sum \$51.25 was paid for overtime on said Saturday afternoon. The court denied defendant's motion to strike from the record all of Moore's testimony, as to moneys expended by plaintiff for the purposes mentioned on each of the three days, "as being immaterial to the issue and as being incompetent to prove damages." And the court, at the conclusion of the trial, assessed plaintiff's damages at \$100, as first above mentioned.

After considering the undisputed evidence and reviewing the authorities we have reached the conclusion that the judgment in question should be affirmed in its entirety. Defendant's counsel do not contend that that part of the judgment, that plaintiff "have and retain possession of the property replevied," is erroneous. Their contention is that plaintiff "failed to make out a case for damages," and in support thereof they quote from portions of section 1144 of 4 Sutherland on Damages, 4th Ed., p. 431a, as follows (italics ours):

"Where the plaintiff obtains possession on his writ of replevin, as is usually the case where the defendant has no legal right to retain it by giving bond, and on the trial maintains his right to it, if the property is obtained without injury or deterioration, he is only entitled to damages for its caption and detention. \* \* The ordinary measure of those damages is interest on the value of the property. \* \* Interest on the value will not be adequate compensation and is not the measure of damages where the use of the property detained is valuable. The owner is entitled to recover the value of the use,



more also testified, over defendant's objection, as

to money paid by plaintiff to defendant for the use of his truck

on May 11th and later, and as to money paid to defendant and

plaintiff's four employees for their transportation in making their

travels upon the warehouse on that day (shop also exhibited)

also as to money paid by plaintiff to defendant for use of his truck,

and to defendant and said four employees for services on January

afternoon, May 1933, in procuring the machine under the writ and

plaintiff is plaintiff's statement. The witness was to both

parties \$125.00, of which each was \$125.00 was paid for services

on said January afternoon. The court found defendant's motion

to strike from the record all of plaintiff's testimony, as to money

paid by plaintiff for the purposes mentioned on each of the

dates, "as being immaterial to the issue and as being

irrelevant to prove damages." And the court, at the conclusion

of the trial, assessed plaintiff's damages at \$100, as shown above

whereof.

That considering the foregoing evidence and reviewing

the evidence we have reached the conclusion that the judgment

is proper and should be affirmed in its entirety. Defendant's

motion to set aside that part of the judgment, that

plaintiff "have not proven possession of the property referred,"

is overruled. That conclusion is that plaintiff "failed to make

out a case for damages," and in support thereof they quote from

petition of parties filed at defendant's request, the following

(this is plaintiff's exhibit):

"Where the plaintiff's motion was made on the 11th

of January, he is entitled to have the decision set aside

inasmuch as the evidence is in dispute, and on the 11th

of January the court is to set aside the decision without

delay or consideration, as is only entitled to damages for

the value of the property. The value of the property is

interest in the value of the property. Interest

on the value will not be adequate compensation and is not the

measure of damages where use of the property is denied in

violation. The court is entitled to review the value of the

if he prefers it to interest, during the time he was deprived of possession."

And counsel argue in substance that, as plaintiff did not introduce any evidence showing the value of the use of the machine for the three or four days that plaintiff was deprived of it by the acts of defendant, the court erred in allowing plaintiff any damages beyond mere nominal damages. We find no substantial merit in counsel's contention or argument. And we do not think that the rule as to the measure of damages, as above stated in said text book, is to be applied to the facts as disclosed from plaintiff's undisputed evidence in the present case. Other rules or principles are more properly to be applied. In 24 Ency. of Law, 2nd Ed., p. 511, in discussing "Damages for the Taking or Detention," it is said: "While the action of replevin is primarily for the recovery of the possession of the property, the plaintiff is entitled in such action to recover the damages he has suffered by reason of the unlawful taking or detention." And it is further said (p. 512): "The plaintiff is entitled to recover such damages as will compensate him for all the detriment proximately caused by the wrongful taking or detention by the defendant, including special damages." And it is further said (p. 514): "In some instances the expenses incurred by the plaintiff before the institution of the replevin action, in attempting to locate and secure possession of the property, have been allowed to him as damages for its detention." And it is further said (p. 515): "Where the unlawful taking or detention by the defendant was the result of malice or wantonness, the plaintiff may, as in other tort actions, recover exemplary damages." In Sec. 23 of the Illinois Replevin Act (Sahill's Stat. 1931, Chap. 119, p. 2309) it is provided: "If judgment is given for the plaintiff in replevin, he shall recover damages for the detention of the property



It is stated that at the time the same was received at the station.

And counsel argues in substance that, as plaintiff did

not introduce any evidence showing the time of delivery of the

mail for the time or that the mail was delivered

at 11 by the date of delivery, the court gives the following ruling:

Will you please deliver your evidence, please.

Plaintiff's evidence in substance is as follows. And we do

not think that the rule as to the measure of damages, as above

stated in this case, is to be applied to the facts as here

presented. Plaintiff's evidence is in the present case.

Other rules on damages are not properly to be applied. In

the case of *Law, 100, 101, 102*, it is stated: "Where the

plaintiff is entitled to the recovery of the property of the property

the plaintiff is entitled to such action to recover the damages

as are entitled by reason of the delivery of the property.

and it is further said (p. 101): "The plaintiff is entitled to

recover such damages as will compensate him for all the loss

actually caused by the delivery of the property by the

defendant, including special damages." And it is further said

(p. 101): "In some instances the damages recoverable by the plaintiff

before the institution of the lawsuit, in addition to

actual and pecuniary loss of the property, have been allowed to

him as damages for the detention." And it is further said (p.

101): "Where the plaintiff takes or detains by the defendant

the property or other property, the plaintiff may, as in

other cases, recover special damages." And it is further said (p.

101): "Where the plaintiff takes or detains by the defendant the

property, he shall recover damages for the detention of the property



while the same was wrongfully detained by the defendant." This section of the Act was considered in the case of Brennan v. Shinkle, 89 Ill. 604, where in an action in replevin commenced before a justice of the peace plaintiff's damages was assessed at \$300, and the judgment was affirmed. After quoting the section of the statute the court said (p. 605): "This includes, not only compensation for any deterioration in the value of the goods replevied while they were in the hands of the defendant, but also for the time lost and expenses incurred by plaintiff in searching for his property." And in the case of McDonough v. Reilly, 131 Ill. App. 553, where a jury found the right of possession of the replevied property to be in plaintiff and assessed her damages at \$400 and the court entered judgment on the verdict against defendant, the appellate court for this district, in affirming the judgment, said (p. 556): "Damages may be assessed by the jury in a replevin suit for deterioration and injury to the goods and other damages incurred through the wrongful taking." (See, also Livestock Publishing Co. v. Union Stockyards Co., 114 Calif. 447, 450-1.) In view of the above authorities and the evidence in the present case we are unable to say that the assessment of plaintiff's damages at \$100 is excessive, even though it appears that plaintiff only paid \$150 for the machine. (See National Purchase Corporation v. McCormick, 284 Ill. App. 63, 69.) And if any portion of the \$100 damages were assessed on the theory that under the circumstances plaintiff was entitled to exemplary damages, we cannot say that this is such a case where exemplary damages should not have been allowed.

The judgment of the municipal court of Chicago, appealed from, should be and is affirmed.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

While the same was repeatedly referred to by the defendant. This  
 portion of the act was considered in the case of Johnson v. Johnson,  
 88 Ill. 2d, where in an action in replevin commenced before a  
 Justice of the Peace Plaintiff's damages were assessed at \$300, and  
 the judgment was affirmed. That Justice the Justice of the  
 Justice the court said (p. 202): "This business, not only  
 compensation for any deterioration in the value of the goods re-  
 leased while they were in the hands of the defendant, but also for  
 the time lost and expense incurred by Plaintiff in recovering the  
 his property." And in the case of Johnson v. Johnson, 121 Ill.  
 121, 221, where a jury found the value of the goods of the  
 defendant to be an amount and assessed his damages at  
 \$100 and the court entered judgment on the verdict against the de-  
 fendant, the appellate court the case affirmed, in affirming the judg-  
 ment, said (p. 222): "Damages may be assessed by the jury in a  
 replevin suit the defendant and injury to the goods and the  
 charges incurred through the wrongful taking." (See, also, Ill.  
121, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 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26789

PEOPLE OF THE STATE OF ILLINOIS,  
Defendant in Error,

v.

RONALD C. OLDHAM,  
Plaintiff in Error.

WENON TO MUNICIPAL

COUNT OF CHICAGO.

274 I.A. 669<sup>5</sup>

MR. JUSTICE BRANLON DELIVERED THE OPINION OF THE COURT.

Ronald C. Oldham, plaintiff in error, hereinafter called defendant, was tried on an information charging him with a violation of sec. 1, par. 298 of the Criminal Code (Smith-Hurd Illinois Revised Statutes, 1929). Defendant, pleading not guilty, waived a jury trial, and after a hearing there was a finding that he was guilty as charged in the information. He has sued out this writ of error to review a judgment sentencing him to pay a fine of \$500 and costs.

Section 1 of par. 298 reads as follows:

"Practicing without license.) \* \* \* That any person residing in this state not being regularly licensed to practice law in the courts of this state, who shall in any manner hold himself out as an attorney at law or solicitor in chancery or represent himself either verbally or in writing, directly or indirectly, as authorized to practice law, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five (\$25.00) dollars, nor more than five hundred (\$500.00) dollars, or imprisonment in the county jail not exceeding one year, or by both fine and imprisonment, at the discretion of the court, for each and every offense, said misdemeanor to be prosecuted and costs assessed as in other cases of misdemeanor under chapter 86 of the Revised Statutes of Illinois."

The information charged that "Ronald C. Oldham heretofore, to-wit: on the 20th day of October A. D. 1930, at the City of Chicago County of Cook aforesaid then and there being a resident of this state and not then and there being regularly licensed to



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practice law in the Courts in this State did unlawfully, and wilfully, verbally and in writing hold himself out as an attorney at law and did then and there in manner and in form as aforesaid act as an attorney at law for the said Harry S. Warren without his then and there having a regular license so to do in violation of Section 1 Par. 292 Ch. 38 R. S. contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois."

The state's attorney has filed a motion here to strike from the record the bill of exceptions in this cause, and while the motion is not without merit we have concluded to consider the bill. The motion to strike is therefore denied.

We have carefully read the entire bill of exceptions and we find that no defense, upon the merits, was interposed. Four witnesses testified for the prosecution. H. H. Warren, the prosecuting witness, testified that he first met defendant in the latter's office at 100 North LaSalle street, Chicago, and last saw him there about October 20, 1930; that he talked with defendant about an invention and a law suit and the latter said he would handle it for the witness "with Mr. 'Haras;" that Mr. and Mrs. Dean were present at the talk; that the witness explained to defendant about his invention and defendant "said that we would have to take action against The John L. Kellogg & Co.;" that he would introduce the witness to attorney 'Haras; that he saw defendant in the latter's office a number of times about the matter; that a contract (People's Exhibit 1) was drawn up by defendant. This contract, dated August 27, 1930, recites that it is entered into "between Harry S. Warren, of Chicago, Cook County, Illinois, as first party, and Barratt 'Haras and Ronald C. Oldham, attorneys-at-law, with law offices in Chicago, Illinois, as second part." It states that the witness "has sought and employed second parties as his sole, and only attorneys to

The first of these is the fact that the bill of exceptions is not a part of the record. It is a separate document, and its contents are not binding on the court. The second is the fact that the bill of exceptions is not a part of the record. It is a separate document, and its contents are not binding on the court. The third is the fact that the bill of exceptions is not a part of the record. It is a separate document, and its contents are not binding on the court.



investigate the facts and circumstances attending the said matter above set out and to represent first party and to institute such proceeding or proceedings or to take such step or steps as may seem to second parties to be necessary and proper and to the best interests of first party, and first party hereby binds himself and his successors, heirs and assigns to pay to second parties for their services hereunder and herein a sum equal to fifty percent of any and all sums of money, shares of corporate stock, bills or notes, thing or things of value such as may be realized by suit, or otherwise, because of the premises. The said Barratt O'Hara and Donald Oldham, attorneys, bind themselves to render best services in the behalf hereinafter indicated." This contract was signed by the witness and "Barratt O'Hara Donald C. Oldham Second Parties." People's Exhibit 2 is a stipulation for substitution of counsel in the case of Julia E. Hoane v. John L. Kellogg et al., in the Superior court of Cook county. In this stipulation Barratt O'Hara and Donald C. Oldham withdraw from the above case "as attorneys of record for the plaintiff," and certain other attorneys enter their appearance in the cause. People's Exhibit 3 is a contract of employment similar to People's Exhibit 1, in which defendant and O'Hara agree to represent Mrs. Lean as her attorneys in the above case. People's Exhibit 4 is a copy of a motion to dismiss a case entitled Harry R. Warren v. John L. Kellogg et al., Case No. 524081, in the Superior court of Cook county, and is signed by defendant and "Barratt O'Hara" "Attorneys for Plaintiff." People's Exhibit 7 is a stipulation and agreement signed by defendant and the attorney who represented him at the trial of this cause, in which defendant stipulates and agrees "I am not now and never have been licensed to practice the profession of Attorney-at-law in the State of Illinois, by the Supreme Court of the State of Illinois; and further admit that my name does not

The first of these is the fact that the defendant has been found guilty of the same crime as the plaintiff. The second is the fact that the defendant has been found guilty of the same crime as the plaintiff. The third is the fact that the defendant has been found guilty of the same crime as the plaintiff. The fourth is the fact that the defendant has been found guilty of the same crime as the plaintiff. The fifth is the fact that the defendant has been found guilty of the same crime as the plaintiff. The sixth is the fact that the defendant has been found guilty of the same crime as the plaintiff. The seventh is the fact that the defendant has been found guilty of the same crime as the plaintiff. The eighth is the fact that the defendant has been found guilty of the same crime as the plaintiff. The ninth is the fact that the defendant has been found guilty of the same crime as the plaintiff. The tenth is the fact that the defendant has been found guilty of the same crime as the plaintiff.

appear on the Roll of Attorneys, a record kept by the Supreme Court of the State of Illinois, at Springfield, Illinois, for the sole and only purpose of showing those who are admitted and have been admitted to practice law in the State of Illinois by the Supreme Court of the State of Illinois; and I further admit that on the hearing of the above entitled cause, wherein and whereas I am charged with practicing law in the State of Illinois without first having obtained a license as to do by the Supreme Court of Illinois, that I will testify as hereinabove stated, and that this statement may be offered and admitted in evidence by the People of the State of Illinois without objection on my part or in my behalf."

People's Exhibit 9, dated December 3, 1930, is an order from defendant to "The Newben H. Bennelley Corporation," a printing firm, to place in "The Chicago Classified Telephone Directory, commencing with the Jan. 1931 issue and continuing thereafter until notified to discontinue by us in writing," defendant's name and telephone number, "under the heading of Lawyers." The witness, Warren, further testified that defendant said, "I am an attorney," and that he would have to get things in shape, and discuss with Mr. O'Hara what to do with the case "if Mr. O'Hara takes the case;" that defendant advised the witness legally in reference to the suit; that the next day defendant made an appointment for the witness to meet Mr. O'Hara and that he then met the latter, who said that he would take the case; that Mr. O'Hara said: "Judge Oldham is a better lawyer than I am, and I want him to help me in the case. When you come here to talk about the case talk to Mr. Oldham and it will be just the same thing as talking to me;" that the witness never talked with Mr. O'Hara about employing the latter in the case. All of the exhibits were admitted without objection by defendant. Mrs. George Dean testified that she met defendant in August, 1930; that she told him that "they"



[illegible]

needed an attorney at once as the Kellogg Company had threatened to go into bankruptcy; that defendant told her to bring Mr. Warren in the next day and he would have Mr. O'Hara meet him; that the next day the witness, her husband and Mr. Warren met Mr. O'Hara; that "the sign on the door was Law Offices of Barratt O'Hara, then there was a line under that and beneath the line was several other names and the name of Mr. Oldham was the last on the list;" that she had a talk with defendant in the presence of Mr. O'Hara about representing her in the case; that she saw defendant in his office about twenty times and talked with him in reference to her legal rights pertaining to an action in the Superior court against The John L. Kellogg Company. There was no cross-examination of this witness. George Dean testified that he first met defendant in August, 1930, in his office at 100 North LaSalle street, Room 612; that he had a talk with Mr. O'Hara and thereafter the witness was present on twenty or more occasions when defendant talked with and advised Warren relative to his litigation and legal rights against the Kellogg Company; that the witness went with defendant to the Superior court upon the occasion when case No. 584081 was filed in that court. At this point defendant's counsel admitted that that suit was filed for Warren against The Kellogg Company by Barratt O'Hara and Ronald C. Oldham, attorneys, and that the documents in connection with the same were filed by defendant as an attorney. The witness further testified that on each occasion that he went to the office defendant advised him about his rights, that he heard defendant advise Warren about his legal rights and that Mr. O'Hara told the witness to do whatever defendant told him to do. There was no cross-examination of this witness. G. Livingston testified that he was an employee of the Donnelley Company, publishers of the telephone directory, and that the name of defendant appeared in the directory as an attorney at law in the city of Chicago and county





of Cook. There was no cross-examination of this witness. Defendant, the sole witness for the defense, testified that he was living at 20 East Delaware place, Chicago; that he had lived there for nearly a year and that he had lived in Chicago about thirteen or fourteen months; that he was in Mr. O'Hara's law office "in the capacity of a law clerk until I am admitted to the bar;" that he was assisting Mr. O'Hara and was working on a salary; that he had known Mr. O'Hara since he met him in Kentucky, about 1928, in a Kentucky case in which both were interested. Defendant then introduced a certificate of the clerk of the Kentucky Court of Appeals, dated March 12, 1928, showing that on March 2, 1928, "Donald Cabot Oldham, of the Clark County, Kentucky bar was introduced to the Court by Hon. Charles Carroll and took the oath prescribed by the constitution and laws of this Commonwealth, whereupon he was admitted to practice as an attorney at law in this Court." The certificate also certified that defendant is an attorney at law in good standing in said court. Defendant also introduced a certificate of the clerk of the Supreme Court of the United States, dated April 26, 1930, certifying that defendant, on April 29, 1931, upon motion, was admitted to practice as an attorney of the Supreme Court of the United States. Defendant also introduced a certificate of the clerk of the United States Circuit Court of Appeals for the Seventh District certifying that on April 29, 1934, defendant was admitted to practice in that court. Defendant testified that he met Warren in August, 1935; that Mrs. Dean came to the office and he told her that he would arrange a meeting with Mr. O'Hara; that at ten o'clock the next morning Mr. and Mrs. Dean and Warren came to the office and went immediately into Mr. O'Hara's private office and the latter requested defendant to remain during the conference; that, after a talk, Mr. O'Hara told them that he would take the case

of Cook. There was no communication at this witness. Before  
only the wife appears for the witness, testified that he was living  
at 20 East Belmont Street Chicago until he had lived there for  
nearly a year and that he had lived in Chicago about thirty or  
thirty-five months. That he was in St. Louis's law office in the  
capacity of a law clerk until he was admitted to the bar. That he  
was assisting Mr. O'Hara and was working on a salary. That he had  
known Mr. O'Hara since he was in Chicago, about 1901, is a  
testimony that is still very relevant. Between the time  
passed a certificate of the clerk of the County Court of Chicago,  
which reads in part, saying that on June 2, 1904, William  
O'Hara, of the State of Illinois, was admitted to the  
bar by Hon. William Carroll and took the oath prescribed by the  
constitution and laws of this Commonwealth, whereas he was  
admitted to practice as an attorney in the State of Illinois.  
The fact that also testified that he was, between the time  
testified in the clerk of the County Court of the State of Illinois,  
about April 22, 1904, certifying that he was, on April 22, 1904,  
upon motion, was admitted to practice as an attorney at the County  
Court of the United States. Between also testified a certificate  
of the clerk of the United States Circuit Court of Appeals for the  
Seventh Circuit certifying that on April 22, 1904, defendant was  
admitted to practice in that court. Defendant testified that he  
was sworn in April, 1904, that was when he was sworn in  
the fact that he was sworn through a writing of Mr. O'Hara, that  
at the time the same reading Mr. O'Hara, that was when he  
is the fact that defendant took the O'Hara's name in the  
and the fact that defendant is sworn during the ceremony  
that after a trial, Mr. O'Hara told him that he would take the same



on a contingent basis and they were to return the following day to sign the contract; that they returned on the following day and by that time "we had learned that the Warrenton Seed Company and the John L. Kellogg Company, were a foreign corporation and that we could file the suit in the United States Court. Mr. O'Hara explained to Mr. Warren, that I had just come to Chicago from Kentucky and that he would like to have me in the case with him, and, explained to Mr. Warren further that it would cost Mr. Warren no more to have me assist Mr. O'Hara and Mr. Warren agreed to this;" that there was a suit filed in the Superior court of Cook county "by Barratt O'Hara, and Ronald C. Oldham, and all that was ever done was the filing of process and an order dismissing the suit, no steps were ever taken in it;" that "we had several negotiations with attys., for Mr. Kellogg about a settlement of Mr. Warren's claim. Mr. Warren, told me to deal through Mr. Jules Oppenheim, Pres., of the American Cereal Coffee Co., who was a friend of Mr. Warren's and at the same time was a director in the Warrenton Seed Company. I talked with him several times and finally through Mr. Busch C. Butler, Atty. for Mr. Kellogg, the claim was adjusted and settled and Mr. Warren signed a release. When the matter was settled Mr. Warren was there and so was Mr. Barratt O'Hara, and he, of course, was consulted all through in the entire matter. \* \* \*

The Court: Then you were practicing law? A. Yes, and without an Illinois License. The Court: Did you mean to hold yourself out as a lawyer in Illinois, when your name was put in the Telephone Directory? A. Why, of course not, Judge, you know how that happened. Mr. O'Hara, had me put that in that for convenience for taking calls for me that came to his office and they were calls from his clients and it was his telephone number. I am not listed in that Directory now. As to the Law Directory I knew nothing about that listing until I saw it in the Directory. The name was



as a contingent basis and they were to return the following day to sign the contract. They returned on the following day and by that time "we had learned that the Jefferson Road Company and the John L. Kellogg Company, were a further corporation and that we could file the suit in the United States Court. Mr. Kellogg explained to Mr. Vernon, that I had just come to Chicago from Kentucky and that he would like to have me in the case with him and, explained to Mr. Vernon's father that it would cost Mr. Vernon no more to have me added to the case than Mr. Vernon agreed to that. That there was a suit filed in the Superior Court of Cook County by Edward O'Hara, and Harold C. Adams, and all that was over there was the filing of process and an order dismissing the suit, no steps were ever taken in it. That we had several negotiations with Mr. Kellogg about a settlement of Mr. Vernon's estate. Mr. Vernon, told me to go through Mr. James O'Connell, brother of the American Canal Office Co., who was a friend of Mr. Vernon's and at the same time was a director in the American Road Company. I talked with him several times and finally through Mr. James O'Connell, Mr. Kellogg, the claim was adjusted and settled and Mr. Vernon signed a release. Then the matter was settled Mr. Vernon was there and so was Mr. Edward O'Hara, and he of course, was dismissed his through in the entire matter. The Court then you were dismissed last 4. That and all that as Illinois. The Court did you mean to hold yourself out as a lawyer in Illinois, when you came out in the following history? A. Why, of course not. Judge, you know how that happened. Mr. Vernon, had me put in that the convention for taking suits for me that came to his office and they were called from his office and so his father's name. I was not listed in that history now. As to the law history I never mentioning about that listing until I was in the history. The name was

given, as I learned, by the girl in the office and if you will look in the next directory, the new one, you will find that it is not there." The following then occurred: "Atty. Roe (attorney for defendant): The fact that he has \* \* \* been admitted to the bar in another State entitles him to practice here while his application is pending." Roe then further questioned defendant as follows: "Have you made application for admission to the Bar in the State of Illinois? A. Yes. \* \* \* Atty. Roe: When did you make application? A. I don't know when I sent the papers in, but I think it was in March or April. Soon after I came here and before I decided to stay here I wrote to Quincy, Ill., for the blanks and they required that a certificate be signed by a Judge in Kentucky, who was in Europe. I finally got the certificate signed by another Judge of the Court of Appeals of Kentucky, and then I delayed until I determined to locate here. Q. When did you make up your mind to locate in Chicago? A. That would be hard to fix the date, if I had to say when I definitely decided I would say sometime in December, 1930. The Court: So far as I understand it Mr. Roe, he admits that he has practiced law. Atty. Roe: Yes, in a case of Mr. Barratt O'Hara, a licensed Illinois lawyer, and he has a right to do that under the law of Illinois and of Kentucky. The Court: Are you familiar with the statutes of Kentucky? Mr. O'Hara: I am. To be sure about it I looked the statute up yesterday and I would like to read you what it says -" Upon the cross-examination the following occurred: "Q. Well, you did practice law in the Warren case and were an attorney of record in the Superior Court? A. I was an attorney of record in that case with Mr. Barratt O'Hara. Q. And in this case for Mrs. Bean? A. Yes, but nothing was ever done in that by us except to sign a substitution of counsel when these people brought their case to you. Q. How many cases did you have prior to the date of this





Warren case? A. None in the State Courts. I recall one in the federal Court where I have a right to practice and I believe the whole time that I have been with Mr. O'Hara, I joined him in three or four cases including these two that you are complaining about.

Q. How many times did you appear in cases for Mr. O'Hara? A. In every instance when I appeared in Court on a motion on one of Mr. O'Hara's cases, I always announced to the Court that this is Mr. O'Hara's case and I am appearing for him. I have appeared in not a single case in Illinois, where I filed my appearance alone as counsel therein." The counsel for defendant asked leave to submit the case on briefs as he wanted an opportunity to "set forth the law of Kentucky and Illinois, as to comity between states and the justification for the acts of the defendant in this case." The case was then submitted to the court and the parties were allowed to submit briefs.

Defendant contends that "this is a record of a strictly private prosecution." We assume from the argument in support of the contention that it is not very seriously made, as in the brief it is stated, in support of the contention: "We mention this in passing in order that this Court get the proper 'picture' of this prosecution." The able and experienced counsel for defendant seem to think that it is proper for them to state in their brief that the state's attorney advised them "that he never heard of the case until months after the conviction." There is nothing in the record to justify this statement. The bill of exceptions states that "Mr. John E. Hogan, appeared for the People of Illinois," and no objection was made at the time of the trial to his taking part in the proceedings and no such point was raised in the assignment of errors, and therefore is not properly before this court. (People v. Smith, 318 Ill. 114, 127.) For aught that appears in this record, Mr. Hogan may have been an assistant state's attorney.



Throughout the common law record it appears that the state's attorney represented the People in the proceedings. The judgment order recites that the People were represented by the state's attorney. In this court the state's attorney is defending the record. There is not the slightest merit in the instant contention, if it can be called a contention.

Defendant contends that "the court erred in admitting incompetent evidence." After a careful reading of the record we find that no evidence was introduced on behalf of the People over the objection of defendant. Defendant specially refers to the introduction of People's exhibits 8 and 9. The record shows that counsel for defendant stated that he had no objection to the introduction of Exhibit 9 and conceded the fact sought to be proved by the exhibit. No objection was made to Exhibit 8 and the fact sought to be proved by that exhibit was undisputed, in fact, it is in accord with the testimony of defendant. In support of the instant contention defendant insists that there is no showing that the witnesses for the prosecution were sworn before they testified. There is no merit in this contention. The bill of exceptions shows that at the commencement of the proceeding all of the witnesses, including defendant, were sworn. In addition, the bill of exceptions shows that all of the witnesses "testified," and, therefore, in the absence of a showing to the contrary, the presumption of law is that they were sworn. (People v. Everts, 341 Ill. 214, 219.) That case also holds that if witnesses are not sworn, but no objection is interposed to their testimony on that ground, the party is deemed to have waived that point, and in the instant case the record shows that no objection was interposed to the testimony of any witness on the ground that he or she was not sworn.





The next contention is that the People failed to prove that defendant was a resident of the state of Illinois, and that therefore the court erred in denying the motion of defendant to dismiss the complaint at the close of the People's evidence as in support of this contention defendant calls attention to the fact that the statute applies only to residents of the state of Illinois. There is no merit in the instant contention. The information was filed February 6, 1931, and the trial took place June 23, 1931. Defendant testified that he lived at 20 East Delaware place, Chicago, and had lived there for nearly a year; that he had lived in Chicago about thirteen or fourteen months; that he was practicing law there; that he had made application for admission to the bar of the state of Illinois. The evidence further shows that he had a law office in Chicago and was engaged in the practice of his profession from at least August, 1930, to January, 1931. He gave an order to the Chicago Classified Telephone Directory to place his name in the list of lawyers and to continue to so place his name until notified to discontinue, in writing. The instant contention is without merit.

The final contention of defendant is that "the judgment of the Court is absolutely void since the penalty fixed is five times the maximum penalty provided by law for the offense the judgment adjudges the defendant to be guilty of." Defendant contends that while the information is based upon section 1, par. 228, ch. 38, the judgment, in effect, finds defendant guilty of a violation of section 1 of chapter 13 of the statutes. We find no merit in this contention. Section 1, par. 228, ch. 38, provides that "upon conviction shall be punished by a fine of not less than twenty-five (\$25.00) dollars, nor more than five hundred (\$500.00) dollars, or imprisonment in the county jail not exceeding one year, or by both fine and imprisonment, at the discretion of

The next contention is that the People's Union is a  
 law-abiding organization and a resident of the State of Illinois, and that  
 therefore the court must in deciding the matter of contempt in  
 finding the complaint of the State of the People's Union as in  
 support of this contention a great deal of evidence is to be  
 presented.

That the evidence applied only to residents of the State of

Illinois. There is no doubt in the instant case.

Information was filed February 4, 1934, and the trial took place

June 22, 1934. Defendant testified that he lived at 20 West

Twenty-Ninth Street, Chicago, and that from the time he was

born he had lived in Chicago where he was at present working

that he was practicing law there; that he had made application for  
 admission to the bar of the State of Illinois. The evidence further

shows that he had a law office in Chicago and was engaged in the

practice of his profession from at least August, 1932, to January,

1934. He gave an order to the Chicago Illustrated Telephone Ex-

change to place his name in the list of lawyers and to continue to

so place his name until notified in otherwise, in writing. The

plaintiff's contention is without merit.

The third contention of defendant is that "the judgment

of the Court is absolutely void since the penalty fixed at five

years the maximum penalty provided by law for the offense the

defendant alleges he committed is only \$500.00. Evidence was

presented that this information is based upon section 1, par.

100, sec. 22, the judgment is correct, since defendant guilty of

a violation of section 1 of chapter 13 of the Statutes. He filed

an order in this connection. Section 13, par. 100, sec. 22.

Further that "some contention shall be punished by a fine of not

less than \$500.00 and not more than \$1,000.00."

Section 13, par. 100, of the Statutes in the second half was amended

and part, in 1934, and in 1935, and in 1936, and in 1937.



the court."

Defendant, through his attorneys, has moved for leave to file what purports to be an affidavit of Harry S. Warren, the prosecuting witness in the case, "and that said affidavit be made a part of the record in this case." This affidavit states that defendant is an honest and fair man and that Warren had wronged him in procuring the warrant for his arrest in the present proceedings and desired "to help him in any possible manner so that he will not be further harmed because of any act of mine." The affidavit also contains certain statements of alleged facts in the matter of the relationship between defendant and Warren. The able counsel for defendant must know that such an affidavit has no proper place in the proceedings in this court, and the motion to file the same will be denied. This was a prosecution by the People of the State of Illinois, and we may add that the material facts proven by the prosecution were not disputed by defendant. He was represented at the trial by an able attorney, and the sole defenses interposed were (a) that as he had been admitted to the bar in Kentucky this fact entitled him to practice in Illinois while his application was pending, and (b) that comity between the states justified the acts charged against defendant. Neither of these positions is sound.

"The enforcement of this statute will have no effect upon a reputable lawyer residing in a foreign state who may temporarily desire to represent a client in this state, as he may rightfully do so as a matter of comity, and non-resident unlicensed attorneys will not come into this state to practice law, and if they should, by reason of their non-residence and want of a permanent location and lack of acquaintances they would be unable to find victims upon whom to practice their wiles. The unlicensed non-resident, therefore, who might desire to practice law in this state differs from the non-resident drummer or peddler who goes into a state other than that in which he resides to sell his goods and wares, and the principles of law which apply to the latter classes have no application to the non-resident who has not been admitted to the bar, and who, possibly, might desire to practice law in this state. The statute applies to every resident of this state who holds himself out as an attorney at law or who represents himself as authorized to practice law and who has not been regularly licensed to practice law or whose license has been revoked." (The People v. Schreiber, 350 Ill. 345, 348-9.)

The judgment of the Municipal court of Chicago is affirmed.  
LULLIVAN, P. J., and GRIDLEV, J., concur.

AFFIRMED.

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A part of the record is still open. While allegedly under this  
 processing almost in the past, and that said allegedly in some  
 so this when reported to be an affidavit of Henry J. ...

10-10-1944

1964-1965

not be further removed from it at all. The child will

also contains certain information re individuals who are

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for the purpose of the investigation.

and the proceedings in this case, and the motion to file the same

ALL be noted: This was a presentation by the people of the State.

1. I have been thinking about you a great deal lately, and wondering how you are getting on. I hope you are well and happy.

in the same way as the other two, but the results are not as good as the other two.

RECEIVED BY THE DIRECTOR, FBI, 11/11/64

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DOI 10.1002/pola.23204

0-9 A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

[illegible]

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 100 million in 1900 to over 200 million in 1960. At the same time, the population of rural areas has decreased from about 100 million in 1900 to about 50 million in 1960. This has led to a concentration of the population in urban areas, which has had a number of important consequences. One of the most important is that it has led to a change in the way of life of the majority of the population. In rural areas, the population is more closely tied to the land, and the way of life is more traditional. In urban areas, the population is more mobile, and the way of life is more modern. This has led to a number of changes in the economy, in the culture, and in the social structure of the United States. For example, the economy has become more industrialized, and the culture has become more diverse. The social structure has become more complex, and the role of the government has become more important. All of these changes have been a result of the process of urbanization, and they have had a profound impact on the United States.

SUBJECT: [REDACTED] b6  
[REDACTED] b7C

100-443887-100

10. The Commission has also received information from the Government of the Republic of the Philippines that the Philippine National Police (PNP) has been instructed to conduct a search for the whereabouts of the following persons:

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the investigation. The investigator must identify the problem and the scope of the investigation. The investigator must also identify the objectives of the investigation. The objectives of the investigation are the goals that the investigator wants to achieve. The objectives of the investigation are the goals that the investigator wants to achieve. The objectives of the investigation are the goals that the investigator wants to achieve.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

1. RESEARCH 2. RESEARCH 3. RESEARCH 4. RESEARCH 5. RESEARCH 6. RESEARCH 7. RESEARCH 8. RESEARCH 9. RESEARCH 10. RESEARCH 11. RESEARCH 12. RESEARCH 13. RESEARCH 14. RESEARCH 15. RESEARCH 16. RESEARCH 17. RESEARCH 18. RESEARCH 19. RESEARCH 20. RESEARCH 21. RESEARCH 22. RESEARCH 23. RESEARCH 24. RESEARCH 25. RESEARCH 26. RESEARCH 27. RESEARCH 28. RESEARCH 29. RESEARCH 30. RESEARCH 31. RESEARCH 32. RESEARCH 33. RESEARCH 34. RESEARCH 35. RESEARCH 36. RESEARCH 37. RESEARCH 38. RESEARCH 39. RESEARCH 40. RESEARCH 41. RESEARCH 42. RESEARCH 43. RESEARCH 44. RESEARCH 45. RESEARCH 46. RESEARCH 47. RESEARCH 48. RESEARCH 49. RESEARCH 50. RESEARCH 51. RESEARCH 52. RESEARCH 53. RESEARCH 54. RESEARCH 55. RESEARCH 56. RESEARCH 57. RESEARCH 58. RESEARCH 59. RESEARCH 60. RESEARCH 61. RESEARCH 62. RESEARCH 63. RESEARCH 64. RESEARCH 65. RESEARCH 66. RESEARCH 67. RESEARCH 68. RESEARCH 69. RESEARCH 70. RESEARCH 71. RESEARCH 72. RESEARCH 73. RESEARCH 74. RESEARCH 75. RESEARCH 76. RESEARCH 77. RESEARCH 78. RESEARCH 79. RESEARCH 80. RESEARCH 81. RESEARCH 82. RESEARCH 83. RESEARCH 84. RESEARCH 85. RESEARCH 86. RESEARCH 87. RESEARCH 88. RESEARCH 89. RESEARCH 90. RESEARCH 91. RESEARCH 92. RESEARCH 93. RESEARCH 94. RESEARCH 95. RESEARCH 96. RESEARCH 97. RESEARCH 98. RESEARCH 99. RESEARCH 100. RESEARCH

Source: U.S. Census Bureau, *U.S. Census of Agriculture, 1954*, Table 1-10, p. 10.

1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 26

36910

GEORGE KAUFMAN,  
Defendant in Error,

v.

JACOB LITZMAN, SAM LITZMAN  
and ABE LITZMAN,  
Plaintiffs in Error.

ERROR TO MUNICIPAL  
COURT OF CHICAGO.

274 I.A. 670<sup>1</sup>

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

George Kaufman recovered a judgment of \$500 against Jacob Litzman, Sam Litzman and Abe Litzman in the Municipal court of Chicago. The case was tried by the court without a jury and the action was brought to recover \$500 paid for the purchase of stock, which sale plaintiff claims was in violation of the Illinois Securities Law.

Defendants contend: (1) "The sale of five shares of the capital stock of Litzman Bros., Inc., by Jacob Litzman, defendant, the owner thereof, to the defendant in error, was not in violation of the Securities Law of the State of Illinois," and (2) "No evidence was introduced to sustain a judgment against Sam Litzman and Abe Litzman, under any theory." We have read the entire bill of exceptions in this case and after a careful examination of the evidence we are satisfied that there is no merit in the two contentions raised by defendants.

The judgment of the Municipal court of Chicago is a just one and it should be and it is affirmed.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.





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RECEIVED  
JAN 10 1944  
U.S. DEPARTMENT OF JUSTICE  
WASHINGTON, D.C.

TO: THE ATTORNEY GENERAL  
FROM: THE ATTORNEY GENERAL  
SUBJECT: [Illegible]  
[The following text is mirrored and largely illegible due to bleed-through from the reverse side of the page.]

36932

ANTON FROESERN,  
Plaintiff in Error,

v.

LOUIS CARABELLI, VIA CARABELLI  
and PAULINE CARABELLI,  
Defendants in Error.

112 H  
ERROR TO CIRCUIT  
COURT OF COOK COUNTY.

274 I.A. 670<sup>2</sup>

MR. JUSTICE SEANLAN DELIVERED THE OPINION OF THE COURT.

A bill of review was filed in the Circuit Court of Cook county by Anton Froesern, plaintiff in error, against Louis Carabelli, Via Carabelli and Pauline Carabelli, defendants in error. A demurrer to the bill was sustained and a decree entered dismissing the bill for want of equity. This writ of error followed.

The bill of review seeks to review certain proceedings that took place in the case of Carabelli v. Carabelli et al. pending in the Circuit court of Cook county, following the filing of a mandate of this court in that case (Carabelli v. Carabelli et al., 266 Ill. App. 453). To quote from plaintiff in error's brief: It seeks "particularly to review a decree entered by the Circuit Court on December 15, 1932, ordering, among other things, that a judgment in the sum of \$3,654.69 be entered against Froesern, on the ground that the said decree was erroneous on the face of the record, and because the same was not in conformity with the opinion and mandate of this Honorable Court rendered in said cause." The opinion we rendered in Carabelli v. Carabelli et al. states fully the pleadings and essential facts in the cause and also the various orders that had been entered up to the time that the instant

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THE UNIVERSITY OF CHICAGO

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FORM NO. 10-70 (REV. 1-70) GSA GEN. REG. NO. 27

On 1940-1941, the first of the series was published. It was a book of 100 pages, and it was the first of a series of books that were published by the same publisher. The book was written by a man who was a member of the same organization. The book was written in a style that was very simple and direct. It was a book that was written for the people, and it was a book that was written for the people. The book was written in a style that was very simple and direct. It was a book that was written for the people, and it was a book that was written for the people.

The bill of review seems to require certain proceedings to be taken in the case of Ward v. Ward in order to bring it before the court for review. It is not clear from the bill whether the court is to review the merits of the case or only the legal questions involved. It is also not clear whether the court is to review the findings of fact or only the conclusions of law. It is suggested that the bill be amended to make these matters clear.



defendants in error appealed from the original decree. For the purposes of this writ of error it is necessary to quote only the following from our opinion:

"We now come to the claim of the appellants (Louis Garabelli and Via Garabelli) that the chancellor erred in not providing in the decree that they were entitled to contribution against appellee (Anton Fresern) for the proportion of the obligations which appellee legally and equitably should have paid, appellee contending Iannone was a mere volunteer and was not entitled to be subrogated to any rights which Coburn and Buchheister had against him, and that by redeeming his title is freed of the Coburn indebtedness and the Buchheister judgment, and he retains his original status in the real estate. We think there is no merit in appellee's contention. The obligation to discharge the Coburn indebtedness was mutual, the appellee as well as the appellants being equally bound to pay that indebtedness, and the Buchheister judgment was the sole obligation of the appellee, and a redeeming creditor who redeems in conformity with the statute is not a mere volunteer. The right of contribution rests upon the principle that where all are equally liable for the payment of a debt all are bound equally to contribute to that purpose. (Lodge v. Hobbs, 854 Ill. 130, 133); and where one tenant in common has removed an incumbrance from the common estate the other tenants must contribute to the extent of their respective interests, and to secure such contribution an equitable lien upon their interests of the same character with that which has been removed will be enforced by a court of chancery. The redeeming tenant in common, in order to secure contribution, is substituted to the same lien which he has redeemed (Pittsworth v. Stout, 49 Ill. 78, 80), and the principle is equally applicable to the judgment creditor of a tenant in common. (Fischer v. Salaman, 68 Ill. 83.)

"The master's report was correct in finding that the appellants were entitled to recover from the appellee \$4,943.88. By the decree the chancellor has absolved appellee from paying his obligations. To uphold that decree would give the appellee an unconscionable advantage and work great injustice to the appellants. We cannot concur in the action of the chancellor.

"The decree of the circuit court will be reversed and the cause remanded with directions to enter a decree that the appellants are equitably entitled to recover from appellee \$4,943.88, together with interest from October 23, 1930, as recommended by the master.

REVERSED AND REMANDED WITH DIRECTIONS."

Plaintiff in error did not, after the filing of our opinion, petition for a rehearing, nor did he petition the Supreme court for a writ of certiorari. Our decision, therefore, was the law of the case and binding upon the parties. When our mandate was filed in the Circuit court the chancellor entered a decree finding, inter alia, that the Garabellis were equitably entitled to recover





from Pressern \$4,943.58, with interest from October 23, 1930, and ordering Pressern to pay the said amount with interest, and that upon his failure so to do the property allotted to him by the decree be sold to satisfy the said amount. The property allotted to Pressern was sold for \$2,100, leaving a deficiency in the sum of \$3,654.69. The chancellor then entered an order finding that there was still due the Carabellis from Pressern the sum of \$3,659.69, with interest from the date of the sale, and judgment was entered therefor and execution ordered. This last order was entered December 15, 1932. Plaintiff in error took no action to have reviewed any order entered by the chancellor in the original proceeding, after our mandate was filed in that court.

"Where a decree is reversed and the cause is remanded with specific directions as to the action to be taken by the trial court it is the duty of that court to follow those directions, and a decree entered in accordance with such directions cannot be erroneous, however erroneous the directions may be. (Boggs v. Willard, 70 Ill. 318; Winkler v. Huggins, 181 id. 164; Roby v. Calumet and Chicago Canal and Dock Co., 154 id. 190; Blackaby v. Blackaby, 189 id. 348; Hobbs v. Winton, 222 id. 639; Winterbach v. Smith, 240 id. 464; Trustees of Schools v. Hoyt, ante, p. 68.) Where a decree has been reversed and the cause remanded with specific directions for the entry of a decree, on an appeal from the decree so entered the only question presented is, Was the decree in accordance with the mandate and directions of this court? (Chicago Railway Equipment Co. v. National Hollow Brake-Beam Co., 238 Ill. 111; People v. Day, 279 id. 148.) A decree entered by a trial court in accordance with the mandate of this court must be regarded as free from error. It is, in fact, the judgment of this court promulgated through the trial court and is final and conclusive upon all the parties. (People v. Gilmer, 5 Ill. 342.)" (Smith v. Huggins, 318 Ill. 218, 218-7.)

"It was the duty of the circuit court to follow the directions of the Appellate Court and enter a decree which conformed to the directions of the Appellate Court. It is to be presumed that the circuit court intended to do this, but whether the court intended to follow the directions of the Appellate Court or not, the decree entered by it was not void. If it did not conform to the directions of the Appellate Court the decree was erroneous and was subject to be reversed on appeal or writ of error." (Gridley v. Reed, 306 Ill. 376, 380-1. *Italics ours.*)

If plaintiff in error considered that any order entered by the chancellor after we had remanded the cause was not in conformity with our mandate he had the right to have that order reviewed by this court by appeal or writ of error, but he saw fit to ignore





the usual methods of review afforded him by the law and filed the instant bill of review, on March 11, 1933, although he might then have sued out a writ of error. A bill of review is not intended to aid anyone who deliberately sleeps upon his alleged rights or who refuses to follow the methods of review afforded him by the law.

A bill of review lies for error apparent on the record, for fraud, or for material evidence not known in time for use at the former trial and not discovered by reasonable diligence at that time. Plaintiff in error does not claim that the bill is based upon either of the last two grounds. His position is thus stated in his brief: "There is no intention on the part of the complainant to seek by these proceedings to have this Honorable Court in effect review or reverse the decision rendered in Carabelli v. Carabelli et al., 286 Ill. App. 453. The bill of review in the court below was filed for the purpose of setting aside those proceedings which transpired subsequent to the filing of the mandate issued pursuant to the opinion filed by this Honorable Court in the original appeal, because these proceedings were not presumably had in accordance with the directions of this Honorable Court. It is the contention of the complainant that by the decision in Carabelli v. Carabelli, supra, this Honorable Court did not direct that any proceedings should be had or taken which would result in a personal judgment against the complainant, Anton Fresern. \* \* \* Nowhere in that opinion does this Honorable Court say that a personal judgment should be entered against Fresern upon his failure to contribute the amount so expended by Iannone. Therefore, when Fresern's interest in the land was sold so as to enable Carabelli as Iannone's grantee and assignee to obtain title thereto, the proceedings should have thus terminated instead of continuing so as to result in a deficiency judgment against Fresern and the issuance of an execution thereon." The







law is settled that when the chancellor, upon remandment of a cause with directions, does not conform to the directions of the appellate court the order entered by him will be reversed on appeal or writ of error. Plaintiff in error is forced to the position that he could avoid a review of the order in question by appeal or writ of error and obtain relief by a bill of review if it appeared that the entry of the personal judgment against him was not in conformity with the direction of this court. No case with a record like the instant one has been cited to me wherein a bill of review was entertained where the sole ground urged in support of the bill was that the chancellor had not conformed to the remanding order.

But even if we assume that a bill would lie upon such a ground, nevertheless, there would be no merit in the instant writ. Our remanding order reads: "The decree of the circuit court will be reversed and the cause remanded with directions to enter a decree that the appellants are equitably entitled to recover from appellee \$4,943.83, together with interest from October 23, 1930, as recommended by the master." The master had found that the Carabellis were equitably entitled to recover from Freeman the sum of \$4,943.83, and he had recommended "that there be a sale in partition of the premises and if the share of Freeman derived therefrom be sufficient, the same should be applied to the payment of the amount herein found. If there be a deficiency the amount should be applied so far as it will reach, and execution issue against Freeman in favor of said Louis and Pia Carabelli for the recovery of any balance remaining unpaid." The chancellor sustained exceptions to the findings and recommendations of the master but he upheld the master. The chancellor after the remandment, <sup>60</sup>conformed to our mandate in entering the order that forms the subject matter of plaintiff in error's only complaint.

The decree of the Circuit court of Cook county in the instant proceedings is affirmed.  
Sullivan, P. J., and Gridley, J., concur. AFFIRMED.



36966

ELIA LEVY,  
(Complainant) Appellant,

v.

REBECCA LEVY,  
(Defendant) Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

REBECCA LEVY,  
(Cross-Complainant) Appellee,

v.

274 I.A. 670<sup>3</sup>

ELIA LEVY,  
(Cross-Defendant) Appellant.

MR. JUSTICE SCARLAN DELIVERED THE OPINION OF THE COURT.

Elia Levy filed his bill for divorce against his wife, Rebecca Levy. The defendant filed an answer to the bill and also a cross-bill for separate maintenance. The chancellor, after a hearing, dismissed the original bill and the cross-bill for want of equity. The complainant in the original bill has appealed.

The original bill alleges, inter alia, that the parties were married at Jerusalem, in Palestine, on January 8, 1909, by a rabbi; that three children were born of the marriage, Shirley, eighteen years old; Nathan, fifteen years old, and Martha, ten years old; that complainant had been a good and true spouse and had provided defendant with the necessities of life; that defendant had been guilty of cruel and inhuman treatment toward complainant and had adopted a course of physical violence against him; that, specifically, on March 26, 1933, and again on March 27, 1933, she used such force and violence against him as to jeopardize his life. The bill prays that the marriage be dissolved.





The cross-bill alleges, inter alia, that the cross-complainant had always treated the cross-defendant with kindness and forbearance; that a few months after the marriage he commenced a course of unkind, cruel and inhuman conduct toward her, which continued until she finally separated from him on March 27, 1933, and that on divers occasions he was guilty of such extreme and repeated cruelty toward her as to render it unsafe for her to live with him; that on March 26, 1933, he beat her, and again on March 27, 1933, struck her over the head with an iron griddle, causing a deep laceration in her scalp so that it became necessary for her to be taken to a hospital; that cross-defendant is a man of violent passion and ungovernable temper and that on many occasions he used the most opprobrious epithets toward her and made threats of personal violence, and repeatedly threatened to take her life as well as his own; that on one occasion, while she and the children were asleep, he opened all of the gas jets in the kitchen, went back into his own room, closed and sealed the door tight and opened the window in his room; that she was awakened by the smell of gas escaping from the gas jets and arose and closed the jets, thus stopping the escape of gas. The cross-bill further charges that cross-defendant had for a considerable time given himself up to adulterous and licentious practices with lewd women, whose names were unknown to cross-complainant.

Complainant contends "that he was prejudiced by the improper and unprofessional conduct of the solicitor for the defendant and cross complainant." It is a sufficient answer to this contention to say that complainant has not assigned as error the alleged conduct of the solicitor for cross-complainant. A question raised in the argument is not open to review where there is no assignment of error which presents such question. (Village

The cross-bill witnesses, after a while, that the women

was not at all surprised at the cross-bill witness's statement and furthermore that a few months after the marriage he announced

a series of visits, great and small, to the women, which

continued until the finally separated from him on March 27, 1925.

and that in diverse occasions he was guilty of such behavior and

repeated himself several times as to conduct in regard to her in the

with him; that on March 22, 1925, he had her, and again on March

27, 1925, after her over the head with an iron pipe, causing

a deep laceration in her scalp so that it became necessary for her

to be taken to a hospital; that cross-bill witness is a man of

violent passions and ungovernable temper and that on many occasions

he used the most reprehensible epithets toward her and made threats

of personal violence, and repeatedly threatened to take her life

as well as his own; that on two occasions, while she and the children

were asleep, he opened all of the doors in the kitchen, and

pushed into his own room, closed and locked the door tight and opened

the window in his room; that she was awakened by the smell of gas

escaping from the gas jets and tried to close the jets, but

without the escape of gas. The cross-bill further charges that

cross-bill witness had for a considerable time given himself up to

drunkenness and dissolute practices with many women, whose names

were known to cross-bill witness.

Cross-bill witness stated as the grounds for the

improper and unbecoming conduct of the witness for the

defendants and cross complainant. "It is a well-known fact that

this complainant is not this complainant but was assigned to work

for the alleged conduct of the witness for cross-complainant. A

petition filed in the argument is not open to review where there

is no assignment of error which grounds such petition. (YIELD)



of Northbrook v. Sterba, 318 Ill. 360, 362-3; Kirchner v. Harrison, 320 Ill. 236, 240; Flewers v. Keller, 323 Ill. 265, 270; City of Chicago v. Chemical Works, 330 Ill. 264, 271.)

Moreover, the case was tried before the chancellor, and we are satisfied that the alleged improper conduct, if there was such conduct, did not affect his judgment in any way. The brief of complainant contains a number of statements praising the chancellor, such as, "The Chancellor who heard this cause is a gentleman of unquestioned integrity and honor;" "the Chancellor, a man of learning and integrity," and "the writer of this brief has a deep and genuine respect for the legal learning, high character and integrity of the Chancellor."

Complainant contends, "It was error to admit the testimony of Nathan Levy, attempting to prove adultery over the objection of the complainant and cross defendant." It appears that the parties to the instant proceeding had been previously involved in another divorce action and that Judge Sabath, who presided at the hearing of that cause, effected a reconciliation of the parties. It further appears that the wife alleged in that cause that the husband had been guilty of adultery, and complainant argues that cross-complainant, by resuming the marital relationship, had condoned the alleged adultery, and that, therefore, it was error for the chancellor in the instant proceedings to permit evidence as to the alleged adultery "without some proof that the alleged offense had been repeated after condonation or explain the delay in making complaint about it. No such evidence was ever tendered in this case." The argument of complainant proceeds, apparently, upon the assumption that to revive the old charge of adultery it was necessary to prove that complainant subsequently committed the same offense. Such is not the law.

IT IS NOTED THAT THE ALLEGEDLY FALSE STATEMENT WAS MADE BY THE  
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THE DEFENDANT'S STATEMENT WAS NOT THE ONLY ONE IN WHICH THE DEFENDANT, WHO WAS AT THE  
TIME OF THE ALLEGEDLY FALSE STATEMENT, WAS NOT THE ONLY ONE WHOSE STATEMENTS WERE FALSE.



"He (the husband) insists, however, that she condoned his adulterous acts in April, 1923, and thereafter cohabited with him as his wife. Condonation, in the law of divorce, is the forgiveness of an antecedent matrimonial offense on condition that it shall not be repeated and that the offender shall thereafter treat the forgiving party with conjugal kindness. (Sharp v. Sharp, 116 Ill. 509; Farnham v. Farnham, 73 id. 497; Lavis v. Lavis, 19 id. 334.) Although condonation implies a condition which will permit the original charge to be considered in connection with a subsequent offense against the marital relation, the later misconduct must amount to more than slight acts of coldness or unkindness or mere quarreling. (Abbott v. Abbott, 192 Ill. 432.) While the facts of each particular case must be considered upon the question whether the former grievance is revived by the subsequent conduct of the offending party, yet it is not necessary that the misconduct succeeding condonation shall be of the same class or character as that condoned, or, standing alone, shall be sufficient to form an independent ground for divorce. The injured spouse has a right to judge of the future by the past, and the court will connect the whole of the unfaithful partner's conduct in order to reach a correct conclusion. Sharp v. Sharp, *supra*; Farnham v. Farnham, *supra*; 2 Schouler on Marriage, Divorce, Separation and Domestic Relations, (6th ed.) sec. 1704; Lavis v. Lavis, *supra*." (Young v. Young, 323 Ill. 608, 613-4. *Italics ours.*)

"Condonation is always accompanied with the implied condition that the injury shall not be repeated. Thus, cruelty of an aggravated character may revive the offense of adultery impliedly condoned \* \* \*." (Puterbaugh Chancery Pl. & Ex. (7th ed.) Vol. 1, p. 671, and cases cited therein.)

We may add that after reading the record we are satisfied that the alleged adultery was not considered by the chancellor in the determination of this case.

Complainant contends that "the finding of the Chancellor dismissing the original bill is against the manifest weight of the evidence and in defiance of all of the disinterested testimony in the record." After a careful reading of the entire evidence we are satisfied that this contention is without merit. In considering this contention it must be remembered that the cross-complainant charged in her cross-bill that complainant (cross-defendant) was guilty of extreme and repeated cruelty toward her. We learn from the record that the final separation of the parties to this proceeding was the third one in their marital life. Divorce is a remedy provided for an innocent party, and when each party has cause for divorce against the other, of the same statutory character, neither





can be granted a divorce. One charged with extreme and repeated cruelty may show in defense that the complainant was equally cruel. Where the evidence shows that both parties were guilty of cruelty neither is entitled to a divorce from the other. (Lubersstein v. Lubersstein, 171 Ill. 133; Garrett v. Garrett, 252 Ill. 318, 332.) Counsel for complainant is compelled to admit that there was daily strife between the couple and he seeks to excuse the conduct of complainant in that regard upon the ground that the wife was always the aggressor. The following excerpts from the brief of complainant will serve to give some idea of the conditions in the home of this couple: "During the period of the marriage, the parties were continually quarreling and frequently indulged in physical violence." "That the home occupied by the parties was the scene of indescribable profanity, obscenity and carnage." "That on the morning of March 26th, a battle between the complainant, Elia Levy, and the defendant, Rebecca Levy, occurred in their home, resulting in physical violence to Elia Levy." "That on the night of March 27th, the home was the scene of carnage, which sent Elia Levy to a physician and Rebecca Levy to a hospital for first aid." We will assume, for the purposes of this appeal, that the cross-complainant was sometimes guilty of cruelty toward complainant. In fact, the chancellor so found or he would not have dismissed her cross-bill. Cross-complainant and the three children of the couple testified that complainant desired a divorce from his wife and that he frequently beat her because she refused to allow him to obtain a divorce. Cross-complainant testified that complainant told her that he was going to make life miserable for her because she would not give him his freedom and enable him to marry the woman he loved. Shirley Levy, a daughter, testified that her father and mother were arguing about divorce all the time and that the father said he would not give the mother any more money unless she gave him a divorce.





We entirely agree with the finding of the chancellor that complainant was guilty of extreme cruelty toward his wife. Complainant argues that the three children hate him and that their testimony as to his conduct should not be believed. The children justify their feelings toward the father upon the ground that he was cruel and unkind to the mother and to them. They testified that besides the acts of cruelty committed by complainant against the mother he also had a habit of striking them. If the testimony of cross-complainant and the children is to be believed, it is not surprising that the children had ceased to love the father, and it is quite plain from the record and from the brief filed by complainant that the father has ceased to have any affection for the children.

The decree of the Circuit court of Cook county is a just one and it should be and it is affirmed.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.

The majority of the people of the Republic  
 have been educated in the spirit of the Republic  
 and are now in the habit of thinking in the  
 spirit of the Republic. The Republic is the  
 only form of government which is based on the  
 principle of the equality of all men. The  
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 is based on the principle of the sovereignty  
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The people of the Republic are now in the habit of thinking in the spirit of the Republic.

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36970

I. MAGNIN & COMPANY,  
a corporation,

Appellant,

v.

MARIE LUBIN et al.,

Appellees.

APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

274 I.A. 670<sup>4</sup>

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Complainant, a judgment creditor of defendant Marie Lubin, filed its bill to secure satisfaction of a judgment rendered against her on July 29, 1932, for \$9,721.89. Demurrers to the original bill were sustained and complainant then filed an amended bill, to which demurrers were sustained, and complainant electing to stand by this bill, it was dismissed for want of equity. Complainant has appealed.

The amended bill alleges the judgment in favor of complainant and against defendant Marie Lubin; that execution issued and was returned unsatisfied.

Plaintiff's theory of the amended bill is:

"Plaintiff's theory of the case is that complainant, though its claim accrued against Marie Lubin subsequent to the execution of the Trust Agreement, may, nevertheless, have the Trust Agreement set aside and so much of the corpus of the trust as will be necessary to that end appropriated to the payment of complainant's judgment. This theory is based largely upon the allegations in Paragraphs 7 and 8 of the amended Bill, which contains the general averment that Herbert Lubin, the original owner of the corpus of the trust, and Marie Lubin, his wife, who executed the Declaration of Trust, devised a plan and scheme whereby Herbert Lubin transferred the corpus of the trust to Marie Lubin without consideration, and she in turn executed the Declaration of Trust by way of an attempt to put the corpus of the trust beyond the present and future creditors of Herbert Lubin, and the present and future creditors of Marie Lubin, it being the theory of complainant that under such circumstances, a subsequent creditor of Marie Lubin, may attack the corpus of





the trust and have it appropriated to the payment of the judgment against Marie Lubin."

Paragraphs 7 and 8 of the amended bill are as follows:

"7. That shortly prior to the 21st day of June, 1927, the said Herbert Lubin and Marie Lubin, his wife, for the purpose of hindering, delaying, and defrauding the present and future creditors of the said Herbert Lubin and Marie Lubin, including one Simon Kirsch, to whom the said Herbert Lubin was then indebted in a large sum, and to attempt to put the property of the said Herbert Lubin beyond the reach of his present and future creditors and the present and future creditors of Marie Lubin, devised a plan or scheme to convey \$1,749,000 of said funds due from said Seaboard National Bank, of New York City, to Marie Lubin, his wife, without consideration, and then have her create a spendthrift trust for the benefit of said Herbert Lubin and Marie Lubin, and certain other contingent beneficiaries, as more fully appears from a copy of said Trust Indenture, with the Chicago Title and Trust Company as Trustee, hereto attached, marked 'Exhibit A' and made a part hereof; that pursuant to said plan and conspiracy between himself and his wife, the said Herbert Lubin did, shortly prior to the 21st day of June, 1927, make, execute and deliver to the said Marie Lubin, his wife, without any consideration moving from the said Marie Lubin to the said Herbert Lubin therefor, a certain assignment of said sums receivable by him from the said Seaboard National Bank, of New York City, aggregating \$1,749,000. The precise nature of said assignment is unknown to your Orator, and therefore your Orator is unable to attach a copy thereof to its Bill of Complaint. Thereby the said Marie Lubin became the legal owner of said funds, subject to the rights of the creditors of Herbert Lubin and her own creditors.

"8. And your Orator further represents that thereafter and on or about the 21st day of June, 1927, the said Marie Lubin, pursuant to said conspiracy between herself and her husband, Herbert Lubin, as Donor, executed and delivered to the Chicago Title and Trust Company, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, with its chief office and place of business in the City of Chicago, County of Cook, and State of Illinois, as Trustee, the Trust Agreement, copy of which is hereto attached, marked 'Exhibit A' and made a part hereof."

Much of the trust agreement (Exhibit A) may be stated in a general way. It describes the property transferred to the trustee by the donor and the powers and duties of the trustee in respect thereto. The second paragraph provides:

"So long as Herbert Lubin husband of the Donor shall be living, said Trustee shall pay over and deliver to the Donor, out of the net income derived from the Trust Property, the sum of \$10,000 per annum as and for the absolute property of the Donor forever and shall pay over and deliver to said Herbert Lubin quarterly or oftener in the discretion of said Trustee, the balance of such net income, as and for the absolute property of the said Herbert Lubin forever.

"From and after the date of the death of said Herbert Lubin,







said Trustee shall pay over and deliver unto Emilia Lundberg, of the City of Chicago, County of Cook and State of Illinois, mother of the Donor, if she shall be living at such time, the sum of \$100 per week during each and every week and ensuing subsequent to the date of death of said Herbert Lubin and prior to the date of the death of said Emilia Lundberg and shall pay over and deliver a like sum of \$100 per week jointly to Max Lubin and Annie Lubin, parents of the said Herbert Lubin, and to the survivor of them, if they or the survivor of them shall be living at such time, during each and every week ensuing subsequent to the date of the death of the said Herbert Lubin and prior to the date of the death of the survivor of said Max Lubin and Annie Lubin; provided however, that so long as either Myron K. Lubin or Barney Lubin, brothers of said Herbert Lubin shall survive, during the lifetime of the survivor of said Max Lubin and Annie Lubin, the payments hereinabove provided to be made to said Max Lubin and Annie Lubin shall be paid either to said Myron K. Lubin or Barney Lubin for the account of said Max Lubin and Annie Lubin and the survivor of them and the receipt therefor by either said Myron K. Lubin or said Barney Lubin shall constitute a full discharge and acquittance of the Trustee, to the extent thereof.

"During each and every year ensuing subsequent to the date of the death of said Herbert Lubin (if the Donor shall be the surviving wife of said Herbert Lubin) and prior to the date of the death or remarriage of the Donor, the Trustee shall pay over and deliver to said Donor as and for her absolute property forever, quarterly or oftener, in the discretion of said Trustee the balance of the net income derived from the Trust Property (and including the sums hereinabove provided to be paid to said Emilia Lundberg, and Max Lubin and Annie Lubin from and after the date of the respective deaths of the said Emilia Lundberg and the survivor of the said Max Lubin and Annie Lubin.)"

The third paragraph relates to the distribution of the property in case of the death of Marie Lubin and Herbert Lubin. The fourth relates to contingent beneficiaries. The fifth and sixth make certain provisions in case of the remarriage of Marie Lubin. The seventh makes certain provisions to take effect in case of the death of Marie Lubin. The eighth provides:

"Each and every payment by the Trustee, either of income or principal, to any beneficiary hereunder, shall be paid, transferred, delivered and conveyed to him or her in person and not upon any written or verbal order nor upon any assignment or transfer by said beneficiary."

It is unnecessary to refer to the provisions contained in the ninth and tenth paragraphs. The prayer of the amended bill is that the trust agreement (Exhibit A) "be declared null and void as to your Orator, and that the Chicago Title and Trust Company, Trustee as aforesaid, be ordered and directed to pay to your Orator the said





sum of \$9,721.39, together with interest and costs of said suit in which judgment was obtained."

Complainant contends, in its original brief, that "under the allegations in Paragraphs 7 and 8 of the Amended Bill, the conveyance by Herbert Lubin to Marie Lubin, and the conveyance in trust by Marie Lubin to the Chicago Title and Trust Company, constituted, as between Herbert Lubin and Marie Lubin, one and the same transaction. Likewise, under these allegations, the conveyance from Herbert Lubin to Marie Lubin was for the purpose of not only defrauding the creditors of Herbert Lubin, but Marie Lubin 'present and future.' Therefore, under the allegations of the bill, the two conveyances, constituting one and the same transaction, so far as Herbert Lubin and Marie Lubin are concerned, were for the purpose of defrauding the creditors of Marie Lubin 'present and future.'" Defendants state that they are willing to adopt, for the purposes of this appeal, "the contention of the complainant that the transfer of funds from Herbert Lubin to Marie Lubin and from her to the Chicago Title and Trust Company, as Trustee, constituted an entire and indivisible transaction and became in fact a transfer from Herbert Lubin directly to Chicago Title and Trust Company, as Trustee. Upon that assumption we may regard Marie Lubin's participation in the transaction in the nature of a conduit through which the funds passed." It will be noted that while the complainant contends that the conveyance from Herbert Lubin to Marie Lubin, and from her to the Chicago Title and Trust Company, as trustee, was "one and the same transaction," it does not ask that the assignment from Herbert Lubin of the funds in the Seaboard National Bank, of New York, to Marie Lubin be voided, but merely seeks to have the property involved revert in Marie Lubin so that it may become available for the satisfaction of complainant's judgment. In its original brief complainant justified this position upon the ground that Marie



sum of \$9,741.88, together with interest and costs of said sale in which judgment was obtained."

Complaint contends, in its original brief, that "under the allegations in Paragraphs 7 and 8 of the Amended Bill, the conveyance by Herbert Lubin to Marie Lubin, and the conveyance in trust by Marie Lubin to the Chicago Title and Trust Company, constitute, as between Herbert Lubin and Marie Lubin, one and the same transaction, distinct from the conveyance of said real estate from Herbert Lubin to Marie Lubin and for the purpose of said sale delinquent the creditors of Herbert Lubin, but Marie Lubin 'present and future.' Therefore, under the allegations of the Bill, the two transactions, constituting one and the same transaction, as far as Herbert Lubin and Marie Lubin are concerned, were for the purpose of obtaining the avoidance of Marie Lubin's conveyance and future." Defendants state that they are willing to admit, for the purpose of this appeal, "the contention of the complainant that the transfer of funds from Herbert Lubin to Marie Lubin and from her to the Chicago Title and Trust Company, as trustees, constituted an entire and indivisible transaction and became in fact a transfer of funds from Herbert Lubin directly to Chicago Title and Trust Company, as trustees. Upon that assumption we may regard Marie Lubin's participation in the transaction in the nature of a conduit through which the funds passed." It will be noted that while the complaint contends that the conveyance from Herbert Lubin to Marie Lubin, and from her to the Chicago Title and Trust Company, as trustees, was "one and the same transaction," it does not say that the real estate from Herbert Lubin to the funds in the Second National Bank of New York, or Marie Lubin be voided, but merely seeks to have the property involved returned to Marie Lubin so that it may become available for the satisfaction of complainant's judgment. In its original brief complainant justified this position upon the ground that Marie

Lubin is estopped from claiming, as to complainant, that the property, the subject matter of the trust, is not her property, but in its reply brief it abandons this theory of estoppel.

The amended bill alleges that the judgment was obtained five years after the creation of the trust, but is silent as to when the indebtedness, upon which the judgment was based, was incurred, but complainant concedes that it was subsequent to the creation of the trust. We are of the opinion that under the facts alleged in the amended bill the creation of the trust in question was not fraudulent as to complainant, a subsequent creditor, and that therefore the action of the chancellor in dismissing the amended bill was justified. (See National City Bank v. Cowdin, 343 Ill. 430, and cases cited therein; Chicago Daily News Co. v. Siegel, 312 Ill. 617, 620; Jones v. Clifton, 101 U. S. 225; McBride v. Bertsch, 58 Fed. (2d) 797.)

In the reply brief of complainant it states that we may ignore all allegations of fraud contained in the amended bill; that the trust created by Marie Lubin is in the nature of a spendthrift trust for her benefit, in part, and as to such part is void as to complainant, a subsequent creditor, regardless of the intent of Marie Lubin in creating the trust, and complainant asks us to regard the amended bill as an attack upon a spendthrift trust. In response to this new position of complainant defendants state that the amended bill is not predicated upon a construction of the spendthrift trust provision of the trust, nor was there a prayer in the amended bill to reach the income of Mrs. Lubin under the alleged spendthrift trust; that the amended bill was predicated solely upon the theory that the establishment of the trust itself was a fraud on future creditors, which entitled complainant to reach the corpus of the estate. Defendants' interpretation of the amended bill is undoubtedly correct. Indeed, complainant, in its

India is excluded from estate, as is maintenance, that the prop-  
erty, the subject matter of the trust, is not her property, but in  
the reply brief is stated this theory of estate.

The amended bill alleges that the judgment was obtained  
five years after the execution of the trust, but is allowed as in  
when the indebtedness, upon which the judgment was based, was in-  
correct, but complaint conceived that it was assigned to the  
creation of the trust. We are at the opinion that under the facts  
alleged in the amended bill the creation of the trust in question  
was not fraudulent as to consideration, a necessary condition, and  
that therefore the action of the court in setting aside the  
amended bill was justified. (See Ballard v. Ballard, 100 N. H.  
203 III. 430, and cases cited therein; Ballard v. Ballard, 100 N. H.  
203 III. 430, 437, 438; Ballard v. Ballard, 100 N. H. 203, 204;  
X. Ballard, 100 N. H. 203, 204.)

In the reply brief of complaint it states that we may  
ignore all allegations of trust contained in the amended bill; that  
the trust created by Maria India is in the nature of a testamentary  
trust for her benefit, in which, and as to which, it is void as to  
consideration, a necessary condition, regardless of the intent of  
Maria India in creating the trust, and complaint asks us to re-  
fute the amended bill as to intent with a "conclusory" averment. In  
response to this new position of complaint defendant states that  
the amended bill is not predicated upon a consideration of the  
apparently trust provision of the trust, nor was there a proper  
in the amended bill to show the intent of Mrs. India under the  
alleged testamentary trust, and the amended bill was predicated  
solely upon the theory that the establishment of the trust itself  
was a fraud on future creditors, which alleged consideration is  
beyond the scope of the estate. Defendant's interpretation of the  
amended bill is necessarily correct. Indeed, complaint, in its



original brief, stated that the income of Marie Lubin in the trust fund was not subject to the payment of her debts "unless there was fraud, real or constructive, in the execution of the Trust Agreement." If the amended bill were an attack upon a spendthrift trust an allegation of fraudulent intent would not be necessary.

We are aware of the well established rule that a donor cannot, even in jurisdictions where spendthrift trusts are allowed, so dispose of his property for his own use, benefit, or support, as to put it beyond the reach of liability for his future debts. (See 25 R. C. L. p. 355; 26 Am. & Eng. Ency. of Law (2 ed.) p. 147, par. 8; 65 C. J. 239-40, sec. 27; McColgan v. Batts, 172 Cal. 132; Brown v. Bagill, 37 Md. 161; Wackmann's Appeal, 42 Pa. 350; Petty v. Moores Brook Sanitarium, 110 Va. 615; Jamison v. Mississippi Valley Trust Co., 207 S. W. 788; Forbes v. Snow, 245 Mass. 35, 39; Charnley v. Smith, 139 Pa. 584; Jackson v. Von Hedlitz, 136 Mass. 342.) Many other cases to the same effect might be cited if it were necessary. If the complainant wishes to reach the interest Marie Lubin reserved to herself in the trust it has the undoubted right to do so by filing a proper bill.

The decree of the Circuit court of Cook county is affirmed.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.



37081

THE WHITCOMB LOCOMOTIVE COMPANY,  
a corporation,

Appellant,

v.

WILLIAM C. WHITCOMB,

Appellee.

APPEAL FROM SUPERIOR  
COURT, COOK COUNTY.

274 I.A. 671<sup>1</sup>

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The Whitcomb Locomotive Company, a corporation, sued William C. Whitcomb in assumpsit. Plaintiff claims that defendant is indebted to it in the sum of \$13,903.42 for moneys of the Geo. D. Whitcomb Company withdrawn by defendant for his personal use while he was president of that company. On March 3, 1931, a voluntary petition in bankruptcy was filed in behalf of the Geo. D. Whitcomb Company (hereinafter also called the Company), pursuant to a resolution of the directors, and the Company was adjudged a bankrupt on that date and Henry C. Warner became trustee in bankruptcy for it pursuant to orders entered in the United States District Court for the Northern District of Illinois, Western Division. The trustee sold, assigned and transferred the assets of the Company to The Whitcomb Locomotive Company, plaintiff. Among the assets so sold was the claim of the Company against defendant, which claim forms the basis of the instant suit, plaintiff suing as the assignee of the trustee in bankruptcy. A jury returned a verdict finding the issue for defendant and plaintiff has appealed from a judgment entered upon the verdict.

On July 6, 1931, defendant filed a plea of non assumpsit and on December 12, 1932, the day before the trial commenced, the trial court allowed defendant to file, instantar, a notice of set-off



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4. **MANITOWOC** • 2nd place • 1st round

TABLE 1. Summary of the 1997-1998 season. The number of fish collected in each of the 12 months is shown in parentheses. The number of fish collected in each of the 12 months is shown in parentheses.

Page 10 of 10

William G. Thompson is currently a research fellow at the University of California, San Diego.

is intended to be used as a guide only and is not intended to be used as a basis for any other purpose.

Mr. Winston Ramsey, Chairman of the Board, is the person who

While he was president of the company, he was elected to the office of Mayor of the City of New York in 1898.

...and the fact that the Commission is not in a position to make a decision in the case of the ...

• *Atomic Energy (Department)* also solves the problem.

As a result of the new program, the company will be able to produce a

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Library for 16 journals in subject related to the United States

RECEIVED, JANUARY 10, 1961

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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ON 20 APRIL 1964, DECEASED, (DOB: 10 APRIL 1920)

100-443887-100

-See to collect a, retirement, bill of materialized benefits, group term-

under the general issue and an affidavit of merits in support thereof. The notice specified three items of set-off against plaintiff. Plaintiff concedes that the first item was a proper subject of set-off but insists that the evidence does not support it. The second item is a claim for \$9,331.35, representing the balance of salary alleged to be due defendant from the Company for the period from March 5, 1931, the date of the voluntary petition in bankruptcy, to December 31, 1931, pursuant to a certain contract of employment entered into between the board of directors of the Company and defendant whereby the board agreed to pay as salary to defendant the sum of \$12,000 per year, and that defendant received for the year 1931 \$2,166.65 in payment to March 5, leaving the said balance due him as above stated. The motion to file this item of the set-off was allowed, over the objection of plaintiff. Item three is a claim for the sum of \$12,222.06 which, it is alleged, represents the amount of a judgment secured on June 5, 1931, by the Rockelle Trust & Savings Bank against defendant and one Carl Heim, in the Circuit court of Eagle county, which judgment, it is alleged, was taken on a note, dated December 8, 1930, executed by Whitcomb Contracting Company and Carl Heim, on which note defendant and Heim were guarantors for the accommodation of the Company; that the Company received the money on the note but failed to pay same at maturity, whereupon judgment was taken by the Rockelle Trust & Savings Bank, as the holder of the note, against Heim and defendant, as above stated.

Plaintiff states its theory as follows: "The defendant for many years while president of the Geo. B. Whitcomb company had maintained a personal account on the company's books, on which he was credited with various moneys, such as salary, and was likewise debited with moneys received by him or otherwise expended by the company for

under the General issue and an affidavit of service in support thereof. The notice specified three items of account against the defendant. The first item was a proper liability of the defendant to the plaintiff for the sum of \$1,000.00, representing the balance of salary alleged to be due the defendant from the company for the period from March 8, 1912, to the date of the voluntary resignation in September, 1912, pursuant to a written contract of employment entered into between the board of directors of the company and defendant whereby the board agreed to pay an salary to defendant the sum of \$12,000 per year, and that defendant received for the year 1911 \$2,100.00 in payment of March 8, leaving the said balance due him as above stated. The motion to file this item of the set-off was allowed, over the objection of plaintiff.

Item three is a claim for the sum of \$12,000.00 which, it is alleged, represented the amount of a judgment secured on June 8, 1911, by the plaintiff from a certain bank, secured by a certain one-half note, in the State of Ohio, which judgment, it is alleged, was filed in a court, dated December 2, 1911, and was by plaintiff's attorney, Messrs. [redacted] and Carl Nelson, on which note defendant and his wife were guarantors for the accommodation of the company. Item four is a claim for the sum of \$1,000.00 which, it is alleged, was some of money, [redacted] judgment was taken by the plaintiff from a savings bank, on the order of the said Carl Nelson and defendant, as above stated.

Plaintiff offers in reply to defendant's motion the following: That the plaintiff is the owner of the company and has the right to pay some of money, [redacted] judgment was taken by the plaintiff from a savings bank, on the order of the said Carl Nelson and defendant, as above stated.

Plaintiff offers in reply to defendant's motion the following: That the plaintiff is the owner of the company and has the right to pay some of money, [redacted] judgment was taken by the plaintiff from a savings bank, on the order of the said Carl Nelson and defendant, as above stated.

Plaintiff offers in reply to defendant's motion the following: That the plaintiff is the owner of the company and has the right to pay some of money, [redacted] judgment was taken by the plaintiff from a savings bank, on the order of the said Carl Nelson and defendant, as above stated.



his use. On May 3, 1930, the defendant's account was credited with \$10,840 cash. When the books of the company were audited in February, 1931, just prior to the bankruptcy, this credit was removed from the account and a corresponding debit was entered on the account, as of December 31, 1930. It is the plaintiff's theory that the reversal of this item was justified inasmuch as the original credit of \$10,840 cancelled corresponding debits on the account, which debits represented company moneys actually received by the defendant for which he should have accounted; and further, the credit of \$10,840 was merely a credit of moneys not paid by defendant but actually belonging to the Geo. D. Whitcomb company having been procured on a company note. Consequently the credit of \$10,840 should never have been allowed. If the credit of \$10,840 remained in the account, the final and undisputed balance due from the defendant to the company was \$3,063.42, but if the credit of \$10,840 was removed from the account, as the plaintiff insisted it should be, then the final balance due from the defendant to the company, and therefore to the plaintiff as assignee of the company, was \$13,903.42. For this amount suit was brought." Plaintiff contends that the Company did not release its claim against defendant.

Defendant states his theory as follows: "The defendant's theory of the case is that defendant was not indebted to the Geo. D. Whitcomb Co. in any sum of money whatever; that plaintiff as assignee of the trustee in bankruptcy of the Geo. D. Whitcomb Co. had no greater rights than the Geo. D. Whitcomb Co. had, and that, therefore, defendant was not indebted to the plaintiff; that as a matter of fact the Geo. D. Whitcomb Co. was indebted to the defendant in the sum of \$9,835.35 representing the balance of salary due him from the Geo. D. Whitcomb Co., as well as the sum of \$815.50 for moneys had and received being the proceeds of 100 shares of

the year 1901, the defendant's account was credited with \$10,000.00. When the books of the company were audited in February, 1902, it was found that this credit was incorrect. The law account was a continuing debit and should be

the account, on 21 November 1901, 1902. It is the plaintiff's theory that the reversal of this item was justified inasmuch as the original credit of \$10,000.00 was a continuing liability on

the account, which liability represented company money actually received by the defendant for which no amount had been accounted for. The credit of \$10,000.00 was made a credit to money and paid by defendant but actually retained in the Geo. W. Thompson company during this period as a company note. Consequently the credit of \$10,000.00 should never have been entered. It is stated by

\$10,000.00 remained in the account, the final and undisturbed balance due from the defendant to the company was \$10,000.00, but if the

credit of \$10,000.00 was reversed from the account, as the plaintiff insisted it should be, then the final balance due from the defendant to the company, and therefore to the plaintiff as assignee of the

company, was \$10,000.00. For this amount will be assigned. Plaintiff contends that the company did not receive the claim

against defendant.

Defendant admits his theory as follows: "The defendant's theory of the case is that defendant was not indebted to the Geo. W.

Thompson Co. in any sum of money whatsoever; that plaintiff as assignee of the trustee in bankruptcy of the Geo. W. Thompson Co. had no greater rights than the Geo. W. Thompson Co. had, and that

therefore, defendant was not indebted to the plaintiff; that as a matter of fact the Geo. W. Thompson Co. was indebted to the defendant

in the sum of \$10,000.00 representing the balance of money due him from the Geo. W. Thompson Co., as well as the sum of \$100.00 for

money had and received being the proceeds of the shares of



Raytheon stock belonging to the defendant."

Plaintiff is justified in contending that in order to reach a verdict for defendant the jury must have considered items two and three of the set-off. The second item of the set-off was for salary claimed by defendant to be due him for the balance of the year 1931, after the bankruptcy of the Company on March 5, 1931. Defendant was employed by the Company, as president, under a resolution adopted by the board of directors in February, 1929, for a period of one year, or until his successor should be elected, or until the further order of the board, at \$12,000 per year. Without any further resolution of the board he served as president during 1929 and 1930, and until March 5, 1931, the date when the Company was adjudicated a bankrupt. His account was credited with salary at \$1,000 a month for January and February, 1931, and with \$166.65 for salary from March 1 to March 5, 1931. He was paid no salary by the Company after the last date.

The following instruction, given to the jury at the instance of defendant (defendant's No. 4), gives the theory upon which defendant's claim, under item two, is based:

"The Court instructs the jury that if you believe from a preponderance of the evidence that the defendant, G. B. Whitcomb, was the duly elected president of the Geo. B. Whitcomb Company for the year 1931 and that it was agreed by and between the defendant G. B. Whitcomb, and the said Geo. B. Whitcomb Company, by and through its board of directors, that the Geo. B. Whitcomb Company pay the defendant a salary as president of said Geo. B. Whitcomb Company of \$12,000 per year, beginning, to-wit, January 1, 1931 and ending on, to-wit, December 31, 1931, and until further order of the board of directors, and if you further believe from the evidence that the defendant performed all of his duties as president of said corporation, until, to-wit, March 5, 1931, and that on or about said date the said Geo. B. Whitcomb Company filed its voluntary petition in bankruptcy in the United States District Court for the Northern District of Illinois, Western Division, and was on, to-wit, March 5, 1931, duly adjudicated a bankrupt and that the said Geo. B. Whitcomb Company thereby prevented said defendant from continuing to perform his duties as president of said corporation, and that the defendant was at all times ready, able and willing to perform his agreement on his part to be performed, and that said Geo. B. Whitcomb Company paid to the defendant, salary only to and including March 5, 1931, in the



Exhibit 1000 belonging to the defendant.

Witness is justified in concluding that in order to

reach a verdict for defendant the jury must have considered them

two and three of the record. The second item of the record

was for salary claimed by defendant to be due him for the balance

of the year 1931, after the bankruptcy of the company on March 2,

1931. Defendant was employed by the company, as president, under

a resolution adopted by the board of directors in February, 1930,

for a period of one year, or until his successor should be elected,

or until the further order of the board, as follows: "That the

without any further resolution of the board or action as president

during 1930 and 1931, and until March 2, 1931, the date when the

company was adjudicated a bankrupt. The amount was payable with

salary of \$1,000 a month for January and February, 1931, and with

\$100.00 for salary from March 1 to March 2, 1931. He was paid

no salary by the company after the last date.

The following instructions, given to the jury at the

instance of defendant (Exhibit 1001), given the jury upon

which defendant's claim, under item two, is based:

"THE COURT INSTRUCTS THE JURY THAT IF YOU BELIEVE FROM  
a preponderance of the evidence that the defendant, J. L. Blythe,  
was the duly elected president of the Blythe Lumber Company for  
the year 1931 and that it was agreed by and between the defendant  
J. L. Blythe and the said J. L. Blythe Company, by and  
through its board of directors, that the said J. L. Blythe  
should receive a salary as president of said Blythe Lumber  
Company of \$1,000 per year, beginning January 1, 1931,  
and ending on March 2, 1931, and that the said J. L. Blythe  
at the time of agreement, and at the time he was paid  
evidence that the defendant received all of his salary as  
president of said Blythe Lumber Company, and that the said J. L. Blythe  
has not or shall not have the said salary of \$1,000 per year  
the voluntary payment in payment to the United States District  
Court for the Southern District of Illinois, Eastern Division,  
and the said J. L. Blythe, only authorized a contract and  
that the said J. L. Blythe Company received payment with  
defendant from defendant as president of said Blythe Lumber  
Company, and that the defendant was as all other things  
paid and willing to perform his agreement on his part to be  
paid, and that said J. L. Blythe Company paid to the  
defendant, salary only as was provided March 2, 1931, in the

sum of \$2,166.65, then you are instructed that the defendant was entitled to receive from the Geo. D. Whitecomb Company the sum of \$12,000 less the sum of \$2,166.65 theretofore paid to the defendant, and less such sum, if any, you believe from the evidence the defendant had, or might by reasonable diligence have earned, subsequent to March 8, 1931 and prior to December 31, 1931, and you are further instructed that the defendant is entitled to set off such sum, if any, as against such amount, if any, you may find from the evidence there be due from the defendant to the plaintiff."

Plaintiff contends that "the court committed reversible error in permitting the filing of the set-off for supposed anticipatory breach of Whitecomb's contract of employment as president of the corporation, and in allowing the set-off to go to the jury," and in giving to the jury defendant's instruction number four.

It is settled<sup>law</sup> that if a set-off is improper, the court should either strike it from the files upon motion (Duncan Lumber Co. v. Leonard Lumber Co., 332 Ill. 104, 106) or exclude all evidence on it upon objection made (Higbie v. Rust, 211 Ill. 333). In the instant case both forms of objection were made by plaintiff and each was overruled by the court. In Duncan Lumber Co. v. Leonard Lumber Co., supra, the court said (pp. 106-7):

"Our statute (Cahill's Stat. 1927, chap. 110, sec. 47, p. 1948), authorizes a defendant 'having claims or demands against the plaintiff in such action,' to plead the same, etc. That statute has been construed in numerous cases by this court to not authorize unliquidated damages arising out of a contract, not connected with the subject matter of the plaintiff's suit, to be set off against the plaintiff's claim. (Hawke v. Landa, 3 Oilm. 227; Argent v. Kellogg, 5 id. 273; DeForest v. Eder, 42 Ill. 500; Robison v. Hibbs, 48 id. 408; Clark v. Lutton, 68 id. 521; Claupe v. Bullock Printing Press Co., 118 id. 612; Higbie v. Rust, 211 id. 333.)"

It is also the settled law of this state that a defendant may not set off claims for unliquidated damages growing out of transactions not connected with the transaction sued on. (Duncan Lumber Co. v. Leonard Lumber Co., supra.) In Boherty v. Chipper & Block, 250 Ill. 128, the court said (p. 132):

"It is well settled that in case an employee is discharged without cause before his term of employment has expired and he has been paid in full up to the time when he is discharged, he may treat the contract of hiring as continuing and bring an action for a breach of the contract of employment against his employer for discharging him, and if the suit is not commenced, or if commenced before but not tried, until his term of employment







has expired, he may recover the contract price of his wages, less what he has earned or by reasonable diligence could have earned in other employment subsequent to his discharge. (Mount Hope Cemetery Ass'n v. Weidenmann, 139 Ill. 67.)" (Italics ours.)

In McPherson v. Board of Education, 235 Ill. App. 426, the court said (p. 430):

"Where an employee is wrongfully discharged and brings an action for breach of contract after his term of employment has expired, he may recover the contract price, less what he has earned or by reasonable diligence could have earned in other employment subsequent to his discharge." (Boherty v. Schipper & Block, 250 Ill. 133.)" (Italics ours.)

It will be noticed that defendant's instruction number four is based upon the theory that it was for the jury to decide what defendant did earn or could have earned in other employment during the period for which he claims damages. Defendant, in the instant case, could not have brought an action of debt, and indebitatus assumpsit could not have been maintained, and it was necessary for him to declare specially on the alleged breach of contract. (See Trustees of Soldiers' Orphans' Home v. Shaffer, 63 Ill. 243.) The test in determining whether the claim is sufficiently liquidated to be a proper claim under indebitatus assumpsit or of set-off is whether the sum is certain or is capable of being readily reduced to a certainty. (The People v. Sumner, 274 Ill. 637, 646.) The claim in the instant case is not for salary earned, because it is admitted that defendant was paid for all services actually rendered, but the item in question is for damages for an alleged breach of contract. To find no merit in the contention of defendant that the set-off arose out of the same transaction upon which plaintiff sues. Plaintiff sues to recover money belonging to it which it claims defendant improperly received. Defendant also contends that the claim is liquidated because had he brought an original action for the alleged breach of contract the compensation agreed upon would be prima facie the measure of damages and the burden would be upon the Company to prove what the employee earned or might have earned





after the discharge, but this principle of law has no application to the question under consideration. Defendant also contends that his right of set-off arises under section 18 (ch. 110) of the Practice act, which provides that in any suit brought by an assignee of a chose in action, not negotiable, "there shall be allowed all just set-offs, discounts and defenses, not only against the plaintiff, but also against the assignor or assignors, before notice of such assignment shall be given to the defendant," and defendant argues "that Section 18 of the Practice act which governs the right of set-off in this case, is much more liberal in its provisions than Section 47, supra. There is no limitation that the right of set-off shall be confined to a suit upon a contract, either express or implied, and it expressly provides that 'there shall be allowed all just set-offs, discounts and defenses;' and defendant further argues "that the claim of the defendant herein was properly allowed as a just set-off, discount and defense under Section 18, irrespective of whether or not it was liquidated or unliquidated, or arose out of the same subject matter as plaintiff's suit." There is no merit in this contention. Section 18 is not intended to give a defendant greater rights of set-off against an assignee than he would have had against the assignor, but the object of the section is to allow a person sued by an assignee the same right of set-off as if he had been sued by the assignor, thus preventing the destruction of a valid set-off by a mere assignment.

We are satisfied that the claim set up in item two was one for unliquidated damages, and that the trial court erred in not striking the item from the files, in allowing evidence bearing upon the same, and in giving the instruction in question.

Plaintiff also argues that under the facts the board of directors of the Company, at the time they voted to file a voluntary petition in bankruptcy, had the undoubted right to



after the change, but this principle of law has no application  
to the present case. The defendant is not a party to the  
the right of set-off arises under section 13 (1) of the  
Trustee Act, which provides that in any suit brought by or  
assigned to a person in action, not negotiable, "there shall be  
allowed all just set-offs, discounts and defenses, not only against  
the plaintiff, but also against the plaintiff in cross-suits, before  
notice of such assignment shall be given to the defendant," and  
defendant argues "that section 13 of the Trustee Act which requires  
the right of set-off in this case, is much more liberal in its  
provisions than section 17. Hence, there is no limitation that  
the right of set-off shall be confined to a suit upon a contract,  
either express or implied, and it expressly provides that 'there  
shall be allowed all just set-offs, discounts and defenses,'" and  
defendant further argues "that the claim of the defendant herein  
was properly allowed as a just set-off, discount and defense under  
section 13, irrespective of whether or not it was assigned or  
unassigned, as none of the same subject matter as plaintiff's  
claim." There is no merit in this contention. Section 13 is in  
reference to give a defendant a right of set-off against an  
assignment from he would have had against the assignor, but the  
object of the section is to allow a person who by an assignment the  
same right of set-off as if he had been made by him himself, thus  
preventing the destruction of a right accorded by a valid assignment.  
We are satisfied that the claim set up in item two was  
one for unliquidated damages, and that the trial court was in  
not striking the item from the list, in allowing evidence bearing  
upon the same, and in giving the instruction in question.

Plaintiff also argues that under the facts the court  
of reference of the company, as the law stood in 1910 a  
plaintiff's position in bankruptcy, and the unaccepted right to

change or abolish the salary of the president, and that the theory of defendant, as stated in his instruction number four, that by the filing of the petition and the adjudication in bankruptcy the Company "prevented said defendant from continuing to perform his duties as president of said corporation" and that therefore he was entitled to recover damages, is not tenable. While this contention is argued with great force, we do not deem it necessary to pass upon the same.

Plaintiff contends: "The court committed reversible error in permitting the defense that Whitcomb was released by Heim's assumption of his obligations and also erred in presenting such defense in Instruction No. 1." Defendant's instruction number one read as follows:

"The Court instructs the jury that even if you believe from the evidence that the defendant's account with the Geo. D. Whitcomb Company was apparently credited with the sum of \$10,840 and that said money belonged to the Geo. D. Whitcomb Company, nevertheless if you also believe from the evidence that Carl Heim agreed to assume and did assume and agree to pay said sum of \$10,840 to the Geo. D. Whitcomb Company, and that said Carl Heim did thereafter execute and deliver to the Geo. D. Whitcomb Company his promissory note therefor and if you further believe from the evidence that said company accepted and retained said promissory note and that said company released the defendant from any obligation to the company for said sum of \$10,840, then you are instructed that the plaintiff cannot recover from the defendant said sum of \$10,840 as aforesaid."

As this case may be tried again, we refrain from analyzing and commenting upon the facts and circumstances bearing upon the subject matter of the aforesaid instruction, although we have pronounced views in reference to the same. It is necessary for us to state, however, that the giving of the above instruction, under the evidence, was highly improper. Heim was the vice-president and treasurer of the Company and the evidence clearly shows that he and defendant engaged in a joint venture for personal gain in the stock market, during the course of which Company funds and Company credits were used. When defendant accepted, from Heim, Company checks in payment of Heim's



tion is agreed with Great Power, we do not deem it necessary to  
issue a protest against it and similar. While this protest  
states as president of said corporation" and that therefore he was  
"guilty" prevented said statement from continuing to perform his  
the issue of the position and the administration in connection with  
it determined, as stated in his declaration number four, that by  
change or abolish the nature of the proceeds, and that the theory

[illegible][illegible]

in this case may be tried again, we retain the analogy and  
commencing upon the facts and circumstances bearing upon the  
subject matter of the above investigation, although we have  
pronounced views in reference to the same. It is necessary for  
us to state, however, that the giving of the above investigation,  
under the evidence, was highly improper. Not only the Vice-President  
and members of the board, and the witness directly above that  
he had not been charged in a formal manner for a year.



personal indebtedness to defendant, a fundamental principle of law declares that defendant became liable to the corporation for the proceeds of the checks, and the later assumption of defendant's said obligation to the Company by Heim, arranged between these two officers, could not relieve defendant from his personal liability to the corporation. It is hardly necessary to state that these two officers, whose interest in the alleged novation or substitution was of a purely personal nature, could not bind the corporation by an understanding between themselves and by bookkeeping methods in furtherance of that understanding. There was no proof that the officers of the Company, aside from Heim and defendant, were parties to the alleged novation or substitution and yet defendant's instruction number one is so worded that it would permit the jury to assume from the conduct of Heim and defendant that the Company thereby consented to the alleged novation or substitution and that therefore defendant was released from his obligation to the Company. The giving of this instruction constituted reversible error.

Plaintiff contends that the verdict of the jury is manifestly against the weight of the evidence. We are in entire accord with this contention. Plaintiff further contends that we should reverse the judgment and enter judgment here for plaintiff. After a careful consideration of this contention we have reached the conclusion that the cause should be remanded.

The judgment of the Superior court of Cook county is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Sullivan, P. J., and Gridley, J., concur.

personal indebtedness to defendant, a fundamental principle of  
 law holding that defendant became liable to the corporation for  
 the proceeds of the checks, and the later assumption of defendant's  
 said obligation to the Company by him, arranged between them two  
 officers, could not relieve defendant from his personal liability  
 to the corporation. It is hardly necessary to state that these  
 two officers, whose names in the alleged novation or substitution  
 was of a purely personal nature, could not bind the corporation  
 by an understanding between themselves and by bookkeeping methods  
 in the absence of legal ratification. There was no proof that the  
 officers of the Company, aside from Hahn and defendant, were parties  
 to the alleged novation or substitution and yet defendant's assumption  
 thereof and its no words that it would permit the jury to assume  
 from the conduct of him and defendant that the Company thereby  
 acquiesced in the alleged novation or substitution and that therefore  
 defendant was released from his obligation to the Company. The giving  
 of this instruction constituted reversible error.  
 Plaintiff contends that the verdict of the jury is  
 manifestly against the weight of the evidence. It was in fact  
 against all the evidence. Plaintiff further contends that he  
 should reverse the judgment and enter judgment upon the plaintiff's  
 plea a general consideration of this contention we have reached  
 the conclusion that the same should be remanded.  
 The judgment of the superior court of Cook County is  
 reversed and the case is remanded for further proceedings not  
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REVEREND AND HONORABLE

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of February, in  
the year of our Lord one thousand nine hundred and thirty-four,  
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

274 I.A. 671<sup>2</sup>

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BE IT REMEMBERED, that afterwards, to-wit: On  
APR 25 1934 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:





IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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February Term, A.D. 1934.

The People of the State of  
Illinois,  
Defendant in Error

vs.

Writ of Error to the County  
Court of Lake County.

James Ryan and John Twohig,  
Plaintiffs in Error.

DOVE, J.

A jury in the County Court of Lake County found plaintiffs in error guilty of removing the manufacturer's serial number on an Automatic Remington rifle, as charged in an Information theretofore filed in that court. After denying motions for a new trial and in arrest of judgment, each defendant was, by the court, sentenced to the Illinois State Farm at Vandalia, to serve ninety days and to pay a fine of \$100.00. To review this judgment, each defendant sued out this Writ of Error and contends that the verdict is contrary to the evidence, that the trial court erroneously instructed the jury and that their motion for a new trial should have been granted on the ground of newly discovered evidence.

The evidence discloses that about four o'clock in the afternoon of April 25, 1933, plaintiffs in error were in an automobile and drove through the Village of Wauconda on Route 176. At the intersection of Route 80, there was a stop sign which they passed unheeded. A highway police officer overtook them and placed them under arrest. At that time Ryan was driving and Twohig was sitting in the rear seat of the automobile and an Automatic high-powered Remington rifle, Model 8, was on the floor at Twohig's feet. It was loaded with five dum dum bullets and an identifying manufacturer's

IN THE  
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Plaintiffs in Error,

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before filed in that court. After denying motions for a new trial and in arrest of judgment, each defendant was, by the court, sentenced to the Illinois State Farm at Joliet, to serve ninety days and to pay a fine of \$100.00. To review this judgment, each defendant sued out this Writ of Error and contends that the verdict is contrary to the evidence, that the trial court erroneously in-  
structed the jury and that their motion for a new trial should have been granted on the ground of newly discovered evidence.

The evidence discloses that about four o'clock in the afternoon of April 25, 1933, plaintiffs in error were in an automobile and drove through the Village of Wauconda on Route 176. At the inter-  
section of Route 80, there was a stop sign which they passed unheeded. A highway police officer overtook them and placed them under arrest. At that time Ryan was driving and Twohig was sitting in the rear seat of the automobile and an automatic high-powered Remington rifle, Model 8, was on the floor at Twohig's feet. It was loaded with five dum dum bullets and an identifying manufacturer's



serial number was completely obliterated. Both were drunk and in reply to a question by the officer as to what they were doing with the rifle, said they were hunting pheasants. Plaintiffs in error thereupon assaulted the officer, attempted to run over him with their automobile in their endeavor to escape, and it was only after a ten mile chase over a gravel road at a rapid rate of speed, approximately 70 miles per hour, that they were re-captured.

Counsel for plaintiffs in error insist that the People in this case relied upon the provision of the Statute to the effect that possession of a firearm upon which a number has been defaced is prima facie evidence that the person in whose possession the gun is found has made the alteration and inasmuch as both defendants denied that they obliterated the number, this presumption was thereby overcome and the court should have directed a verdict in their favor. Plaintiffs in error did testify in their own behalf. Mr. Ryan testified that he was driving the car; that he first saw the gun in the office of the Justice of the Peace in Wauconda after his arrest; that it was not his gun and he did not know whose it was and that he did not remove or obliterate any number therefrom. Mr. Twohig testified that he did not see the gun in the car the day he was arrested or know it was there, but that he first saw it at Wauconda after his arrest. He admitted that he attempted there to hide it under his coat, but said he was drunk and was acting in fun at the time. He likewise testified that he did not remove or obliterate any number thereon. Whether or not this presumption that the defendants, in whose possession this gun was found, altered the number thereon, was overcome by the evidence was a question of fact for the jury to determine and its verdict indicates that the jury refused to accept the testimony of either defendant and we are unable to say they were not warranted in so doing. While each defendant, on the trial, testified that he did

serial number was completely obliterated. Both were drunk and in reply to a question by the officer as to what they were doing with the rifle, said they were hunting pheasants. Plaintiff in error thereupon assaulted the officer, attempted to run over him with their automobile in their endeavor to escape, and it was only after a ten mile chase over a gravel road at a rapid rate of speed, approximately 70 miles per hour, that they were arrested.

Counsel for plaintiff in error insist that the People in this case relied upon the provision of the Statute to the effect that possession of a firearm upon which a number has been defaced is prima facie evidence that the person in whose possession the gun is found has made the alteration and inasmuch as both defendants denied that they obliterated the number, this presumption was thereby overcome and the court should have directed a verdict in their favor.

Plaintiff in error did testify in their own behalf. Mr. Ryan testified that he was driving the car; that he first saw the gun in the office of the Justice of the Peace in Wauconda after his arrest; that it was not his gun and he did not know whose it was and that he did not remove or obliterate any number therefrom. Mr. Twining testified that he did not see the gun in the car the day he was arrested or know it was there, but that he first saw it at Wauconda after his arrest. He admitted that he attempted there to hide it under his coat, but said he was drunk and was acting in fear at the time. He likewise testified that he did

not remove or obliterate any number thereon. Whether or not this presumption that the defendants, in whose possession this gun was found, altered the number thereon, was overcome by the evidence was a question of fact for the jury to determine and its verdict indicated that the jury refused to accept the testimony of either defendant and we are unable to say they were not warranted in so doing. While each defendant, on the trial, testified that he did

not know the gun was in the car and that the first time he saw it was in Wauconda after his arrest, it was also in evidence that when questioned at the time of their arrest, by the officer who made the arrest, they did not deny the ownership of the gun but stated that they had it for the purpose of hunting pheasants. It is true they were drunk, but they were sober enough to understand they were being arrested and they endeavored to effectuate an escape. The jury were the judges of the facts in this case and the credibility of the witnesses and unless there appears from all the evidence a reasonable doubt of the guilt of the defendants, the jury were warranted in finding them guilty. There was no error in refusing to direct a verdict of not guilty for the defendants, nor can it be said that the verdict is contrary to the weight of the evidence.

It is next contended that the court erred in giving instruction number nine, which embodied the statutory definition of an accessory and then concluded "and if the jury find from the evidence, beyond a reasonable doubt, that the defendant, James Ryan, did aid, abet, assist, advise or encourage the perpetration of the crime as charged in the information, then the jury are justified in finding said defendant guilty." Counsel admits that this instruction has been approved in *People v. Nowicki*, 330 Ill. 381, but insist that it was error to give it because it names James Ryan, and by so doing assumes that the crime was committed by Twohig. According to the testimony of the highway officers, the gun was at the feet of Twohig in the car which Ryan was driving. Under all the evidence and facts and circumstances in evidence, we do not believe that this instruction is subject to the criticism directed against it and the court did not err in giving it. The *People v. Arbuthnot*, 355 Ill. 577.

The instruction upon circumstantial evidence properly stated the law as counsel for plaintiffs in error concede and it is not pointed out in what particular it could have been misleading to



not know the gun was in the car and that the first time he saw it was in Wauconda after his arrest, it was also in evidence that when questioned at the time of their arrest, by the officer who made the arrest, they did not deny the ownership of the gun but stated that they had it for the purpose of hunting pheasants. It is true they were drunk, but they were sober enough to understand they were being arrested and they endeavored to effectuate an escape. The jury were the judges of the facts in this case and the credibility of the witnesses and unless there appears from all the evidence a reasonable doubt of the guilt of the defendants, the jury were warranted in finding them guilty. There was no error in refusing to direct a verdict of not guilty for the defendants, nor can it be said that the verdict is contrary to the weight of the evidence.

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The instruction upon circumstantial evidence properly stated the law as counsel for plaintiffs is error contends and it is not pointed out in what particular it could have been misleading to

the jury. Instruction number eight told the jury that flight of a defendant soon after the commission of an offense is to be considered by the jury with the other evidence in the case in determining the question of guilt. Counsel for plaintiffs in error say there was no flight shown after the commission of the crime charged in this information. The evidence, however, is that after the officer placed plaintiffs in error under arrest and had had the conversation about the gun and took possession of it that then plaintiffs in error sought to escape. There was no error in giving this instruction. *People v. White*, 341 Ill. 356.

Instruction number seven is as follows: "The court instructs you in the language of the Statute, that no person shall change, alter, remove or obliterate the name of the maker, model, manufacturer's number or other mark of identification on any firearm. Possession of any firearm upon which any such mark shall have been changed, altered, removed or obliterated, shall be prima facie evidence that the possessor has changed, altered, removed or obliterated the same." Counsel for plaintiffs in error insists that this instruction defines more than one offense and by not including any definition or meaning of the words 'prima facie', it would be likely to confuse and mislead the jury. The use of the words 'prima facie' in instructions has frequently been condemned. *People v. McCurrie*, 337 Ill. 290: *People v. Sikes*, 328 Ill. 64: *Gresh v. Acom*, 325 Ill. 474: *Johnson v. Pendergast*, 308 Ill. 255: *People v. Tate*, 316 Ill. 52 and *Riddle v. Mansager*, 254 Ill. App. 68. In *People v. Beck*, 305 Ill. 593, however, an instruction using these words was approved, and while this instruction does define more than one offense, it is in the language of the Statute and in our opinion no reversible error was committed in giving this instruction.

In support of plaintiffs in error's motion for a new trial, the affidavit of Lillian Ryan and Wm. Scott Stewart, the attorney representing plaintiffs in error, was submitted to the Court. In her affidavit, Miss Ryan stated that shortly after the arrest of her brother, she visited Wauconda and the surrounding territory and

the jury. Instruction number eight told the jury that if it  
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considered by the jury with the other evidence in the case in  
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*People v. Shaw*, 222 Ill. 444; *People v. Jones*, 220 Ill. 444; *People*  
*v. Fendler*, 208 Ill. 281; *People v. Tate*, 210 Ill. 182 and  
*Riddle v. Mahanagar*, 234 Ill. App. 68, in *People v. Beck*, 303 Ill.  
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in the language of the Statute and in our opinion no reversible  
error was committed in giving this instruction.  
In support of plaintiffs in error's motion for a new trial,  
the affidavit of William Ryan and Mr. Scott Stewart, the attorney  
representing plaintiffs in error, was submitted to the Court. In  
her affidavit, Miss Ryan stated that shortly after the arrest of  
her brother, she visited Randolph and the surrounding territory and



made inquiry of various persons in an endeavor to learn the movements of her brother during the day of his arrest. That her brother had informed her that at the time of his arrest, he was so drunk that he had no recollection of the places he visited except that he remembered going to several road houses and drank beer and whiskey therein. That following his conviction by the jury on May 25, 1933, the Chicago American, on the following day, carried a news article concerning the trial and at noon on that day she received a telephone call from someone who refused to give his name, advising her that the rifle which was offered and admitted in evidence upon the trial of this cause, had been purchased from Hibbard, Spencer and Bartlett, wholesale hardware dealers in Chicago, some years before. That an examination of the gun would disclose that it also had serial numbers on the inside, and that from these the name of the person who owned the gun at the time the outside serial number was removed could be ascertained, as the then owner had taken the gun to a gunsmith for repairs, but that affiant had been unable to locate this gunsmith but concluded that if she was given an opportunity to run down this information, she would be in a position to prove that the numbers on this gun had been removed a long time prior to the time that the law under which this information was drawn went into effect. Mr. Stewart, in his affidavit, stated that on May 26, 1933, as soon as he received the information contained in the affidavit of Miss Ryan, he immediately got in touch with Mr. Setchel, a gun expert in the employ of Hibbard, Spencer and Bartlett Company and was informed that his company had discontinued keeping any record of any serial numbers of guns similar to the one offered in evidence in this case and had no record of the purchase of any rifle similar to the one involved. In this affidavit Mr. Stewart states that Mr. Setchel explained to him the manner in which serial numbers were placed inside of guns of this model and thereafter affiant went to Waukegan and in the presence of the State's Attorney inspected the gun and found that it bore on the inside in two places and also stamped on *the*

made inquiry of various persons in an endeavor to learn the movements of her brother during the day of his arrest. That her brother had informed her that at the time of his arrest, he was so drunk that he had no recollection of the places he visited except that he remembered going to several road houses and drank beer and whiskey therein. That following his conviction by the jury on May 22, 1935, the Chicago American, on the following day, carried a news article concerning the trial and at noon on that day she received a telephone call from someone who refused to give his name, advising her that the rifle which was offered and admitted in evidence upon the trial of this case, had been purchased from Hibbard, Spencer and Bartlett, wholesale hardware dealers in Chicago, some years before. That an examination of the gun would disclose that it also had serial numbers on the inside, and that from these the name of the person who owned the gun at the time the outside serial number was removed could be ascertained, as the then owner had taken the gun to a gunsmith for repair, but that affiant had been unable to locate this gunsmith but concluded that if she was given an opportunity to run down this information, she would be in a position to prove that the numbers on this gun had been removed a long time prior to the time that the law under which this information was drawn went into effect. Mr. Stewart, in his affidavit, stated that on May 22, 1935, as soon as he received the information contained in the affidavit of Miss Ryan, he immediately got in touch with Mr. Setchel, a gun expert in the employ of Hibbard, Spencer and Bartlett Company and was informed that his company had discontinued keeping any record of any serial numbers of guns similar to the one offered in evidence in this case and had no record of the purchase of any rifle similar to the one involved. In this affidavit Mr. Stewart states that Mr. Setchel explained to him the manner in which serial numbers were placed inside of guns of this model and thereafter affiant went to Waukegan and in the presence of the State's Attorney inspected the gun and found that it bore on the inside in two places and also stamped on the

of the stock, serial No. 64523. That affiant thereupon wired the manufacturers at Bridgeport, Connecticut, requesting the name of the dealer and date of sale of this gun as shown by the records of that Company, but was informed by the company that it had not kept such a record for several years. By this affidavit it also appears that Mr. Stewart was not afforded an opportunity of examining the gun prior to the trial.

The only suggestion made by counsel in connection with the showing made by plaintiffs in error for a new trial on the ground of newly discovered evidence is that the witness for the People who testified that the serial number of this gun did not appear on the inside of this model was mistaken, as the subsequent examination of the gun demonstrated. Neither this fact or any other matter contained in the affidavits of Lillian Ryan or plaintiffs in error's distinguished counsel would have warranted the trial court in awarding a new trial.

This record is free from reversible error and the judgment of the County Court of Lake County is affirmed.

JUDGMENT AFFIRMED.



examining the gun prior to the trial.

the trial court in awarding new trial.

• **CONSTITUTIONAL**

STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*





## AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the sixth day of February, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

274 I.A. 671<sup>3</sup>

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BE IT REMEMBERED, that afterwards, to-wit: On

APR 25 1934 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



In the Appellate Court of Illinois

Second District

February Term, A. D. 1934

John H. Rusch, Receiver of the

First National Bank of Polo,

Appellee,

vs.

Appeal from the Circuit Court of

Ray D. Hedrick, Administrator of

Ogle County

the Estate of Martha C. Hedrick,

deceased,

Appellant,

DOVE-J.

Prior to April 2, 1930, Ross R. Hedrick was indebted to the Exchange National Bank of Polo, Illinois in the sum of \$9,250.00, and on that date, as evidencing said indebtedness, he executed and delivered to said bank four notes, each dated April 2, 1930, one for \$6,000.00, one for \$1,500.00, one for \$1,000.00 and one for \$750.00. On May 19, 1930 the \$1,500.00 note and the \$750.00 note were combined and a renewal note taken for \$2,250.00, and this note was executed by Ross Hedrick and his mother, Martha C. Hedrick, and delivered to and accepted by the bank. Subsequently, Martha Hedrick executed and delivered to the Exchange National Bank of Polo, Illinois the following instrument, viz:

"Guaranty to Bank

July 2, 1930

To the Exchange National Bank  
Polo, Illinois  
Gentlemen:

In consideration that you will make advancements from time to time to Ross R. Hedrick, I hereby guarantee the payment of any future balance that may be due to you from said Ross R. Hedrick on account of Notes, bills, loans, payments or advancements, growing out of financial transactions whereby the said Ross R. Hedrick shall become indebted to you. I also guarantee payment of notes now owed to you by said Ross R. Hedrick in the amount of \$9,250.00.



In the Appellate Court of Illinois

Second District

February Term, A. D. 1934

John H. Ruson, Receiver of the

Trust National Bank of Polo,

Appellee,

vs.

Ray D. Hedrick, Administrator of

the Estate of Martha C. Hedrick,

Appellant.

Appeal from the Circuit Court of

Ogle County

Appeal from the Circuit Court of

DOCK-1.

Prior to April 2, 1930, Ross R. Hedrick was indebted to the Exchange National Bank of Polo, Illinois in the sum of \$2,350.00, and on that date, as evidencing said indebtedness, he executed and delivered to said bank four notes, each dated April 2, 1930, one for \$6,000.00, one for \$1,500.00, one for \$1,000.00 and one for \$50.00. On May 19, 1930 the \$1,500.00 note and the \$50.00 note were combined and a renewal note taken for \$2,350.00, and this note was executed by Ross Hedrick and his mother, Martha C. Hedrick, and delivered to and accepted by the bank. Subsequently, Martha Hedrick executed and delivered to the Exchange National Bank of Polo, Illinois the following instrument, viz:

July 2, 1930

"Guaranty to Bank

To the Exchange National Bank  
Polo, Illinois  
(Witness:)

In consideration that you will make advancements from time to time to Ross R. Hedrick, I hereby guarantee the payment of any future balance that may be due to you from said Ross R. Hedrick on account of Notes, bills, loans, payments or advancements, growing out of financial transactions whereby the said Ross R. Hedrick shall become indebted to you. I also guarantee payment of notes now owed to you by said Ross R. Hedrick in the amount of \$2,350.00.

It is understood, however, that my liability under this agreement shall not exceed \$9,250.00 Dollars and that it shall continue only for a period of two years from the date of this instrument.

MARTHA C. HEDRICK

ROSS H. HEDRICK  
Witness"

On July 5, 1930, Ross Hedrick renewed his \$1,000.00 note and on October 3, 1930 he again renewed it, delivering the renewal notes to the Exchange National Bank. On August 26, 1930, the \$6,000.00 note was renewed by Ross Hedrick and these instruments and the \$2250.00 note executed by Ross Hedrick and his mother Martha C. Hedrick upon which his mother had paid \$750.00 on October 9, 1930 were held by the Exchange National Bank of Polo when it went into liquidation prior to October 20, 1930. Subsequently The First National Bank of Polo, Illinois was organized, and on October 20, 1930 some of the assets of the Exchange National Bank were, for a valuable consideration, duly assigned and transferred by the Exchange National Bank to the First National Bank of Polo. Among the assets so assigned were these notes of Ross Hedrick and his mother and this instrument of guaranty dated July 2, 1930. On February 28, 1931 Ross Hedrick executed and delivered to the First National Bank of Polo his note for \$6,000.00 in renewal of his former note for a like amount, and on May 19, 1931 executed and delivered to The First National Bank of Polo his note for \$1500.00 representing the balance due on the note which had been signed by himself and his mother. Subsequently Martha C. Hedrick died and The First National Bank of Polo having gone into the hands of a Receiver, appellee, as such Receiver, filed in the County Court of Ogle County its claim against her estate. The claim as filed had attached thereto a copy of the note of February 28, 1931 for \$6,000.00 and a copy of the note of May 19, 1931 for \$1500.00, and recited that the amount represented by these notes was due and unpaid and is a claim against the estate of Martha C. Hedrick because she guaranteed to the Exchange National

It is understood, however, that my liability under this agreement shall not exceed \$2,500.00 Dollars and that it shall continue only for a period of two years from the date of this instrument.

MARTHA C. HEDRICK

ROSE M. HEDRICK  
Witness

On July 5, 1930, Rose Hedrick renewed his \$1,000.00 note and on October 3, 1930 he again renewed it, delivering the renewal notes to the Exchange National Bank. On August 25, 1930, the \$2,000.00 note was renewed by Rose Hedrick and these instruments and the \$2350.00 note executed by Rose Hedrick and his mother Martha C. Hedrick upon which his mother had paid \$750.00 on October 3, 1930 were held by the Exchange National Bank of Polo when it went into liquidation prior to October 30, 1930. Subsequently the First National Bank of Polo, Illinois was organized, and on October 30, 1930 some of the assets of the Exchange National Bank were, for a valuable consideration, duly assigned and transferred by the Exchange National Bank to the First National Bank of Polo. Among the assets so assigned were these notes of Rose Hedrick and his mother and this instrument of guaranty dated July 3, 1930. On February 28, 1931 Rose Hedrick executed and delivered to the First National Bank of Polo his note for \$2,000.00 in renewal of his former note for a like amount, and on May 19, 1931 executed and delivered to the First National Bank of Polo his note for \$1500.00 representing the balance due on the note which had been signed by himself and his mother. Subsequently Martha C. Hedrick died and the First National Bank of Polo having come into the hands of a Receiver, appointed, as such Receiver, filed in the County Court of Ogle County the claim against her estate. The claim so filed was attached to a copy of the note of February 28, 1931 for \$2,000.00 and a copy of the note of May 19, 1931 for \$1500.00, and stated that the account represented by these notes was due and unpaid and is a claim against the estate of Martha C. Hedrick and was the instrument to the First National Bank of Polo.



Bank of Polo, assignor of The First National Bank of Polo, the payment thereof. The claim then set forth the guaranty verbatim and stated that the original notes were made payable to the Exchange National Bank, but before they became due they were purchased, with other assets, by the First National Bank of Polo and were renewed in the name of The First National Bank.

In order to reduce Ross's indebtedness to the maximum sum allowed by law and thus permit the newly organized First National Bank to take over his notes as assets, Martha Hedrick executed and delivered to the First National Bank her note for \$1750.00. Approximately a year later the First National Bank took judgment against Ross upon his several notes and this resulted in Ross filing a voluntary petition in bankruptcy and he was subsequently adjudged a bankrupt. The Hearing in the County Court resulted in a judgment for the Administrator and upon an appeal to the Circuit Court a jury was waived and a judgment rendered in favor of the claimant for \$6492.41, and the Administrator of the Estate of Martha Hedrick, deceased, brings the record to this court for review by appeal.

Appellant first insists that this was a conditional guaranty on the part of Martha C. Hedrick and unless and until the Exchange National Bank advanced or loaned additional money to Ross Hedrick, she was not liable upon this instrument. That the word "advancements" as therein used meant future loans and that inasmuch as the evidence disclosed that no additional sums were loaned Ross Hedrick, the guaranty was without consideration.

In the construction of contracts, courts will give to the language employed the meaning intended by the parties. At the time this instrument was executed Ross Hedrick was indebted to the Bank in the sum of \$9250.00 as therein stated. The Bank wanted this loan secured. When two of the notes matured, Martha Hedrick signed them with her son and the guaranty was obtained in order to obviate the

Bank of Polo, assignor of The First National Bank of Polo, the pay-  
ment thereof. The claim when set forth the guaranty verbatim and  
stated that the original notes were made payable to the Exchange  
National Bank, but before they became due they were purchased, with  
other assets, by the First National Bank of Polo and were renewed  
in the name of The First National Bank.  
In order to reduce Rosa's indebtedness to the minimum sum  
allowed by law and thus permit the newly organized First National Bank  
to take over his notes as assets, Martin Hedrick executed and de-  
livered to the First National Bank her note for \$150.00. Approximately  
a year later the First National Bank took judgment against Rosa upon  
his original notes and this resulted in Rosa filing a voluntary peti-  
tion in bankruptcy and he was subsequently adjudged a bankrupt. The  
debts in the County Court resulted in a judgment for the Adminis-  
trator and upon an appeal to the Circuit Court a jury was waived  
and a judgment rendered in favor of the claimant for \$243.41, and  
the Administrator of the Estate of Martin Hedrick, deceased, brings  
the record to this court for review by appeal.  
Appellant first insists that this was a conditional guaranty  
on the part of Martin G. Hedrick and unless and until the Exchange  
National Bank advanced or loaned additional money to Rosa Hedrick,  
she was not liable upon this guaranty. This is said to be immaterial  
as certain need arise before loan and that interest on the balance  
advanced that no additional sums were loaned Rosa Hedrick, the  
guaranty was without consideration.  
In the construction of contracts, courts will give to the  
language employed the meaning intended by the parties. At the time  
this instrument was executed Rosa Hedrick was indebted to the Bank  
in the sum of \$250.00 as therein stated. The Bank wanted this loan  
renewed. When two of the notes matured, Martin Hedrick signed them  
also for her and the guaranty was obtained in order to obviate the

necessity of having the mother sign each note or a renewal thereof as they became due. At the time the assets of the Exchange Bank were transferred to the newly organized First National Bank, Mrs. Hedrick gave her further note in order to reduce the indebtedness of her son. In our opinion this guaranty was absolute and unconditional. It recited that Ross Hedrick owed the Exchange Bank \$9350.00 at the time the instrument was signed. It contained an absolute, unqualified guaranty on the part of Mrs. Hedrick to pay the notes evidencing that amount. The notes evidencing these amounts were canceled and surrendered and new instruments extending the time of payment thereof were executed by Ross and accepted by the Bank. This guaranty was assigned, for a valuable consideration, by the Exchange Bank to the First National Bank, and thereafter the First National Bank, relying upon this instrument and being the beneficiary thereof, surrendered to Ross the notes which he had executed to the Exchange Bank, and accepted from him new notes due at future dates. The principal debtor became a bankrupt and the indebtedness having matured, the estate of the guarantor is liable therefor. Any act which is a benefit to one party and a disadvantage to the other is a valuable consideration. Schlatter v. Triebel, 234 Ill. 412; People v. Commercial Life Insurance Co., 247 Ill. 92; Buchanan v. International Bank, 78 Ill. 500; Burch v. Hubbard, 148 Ill. 164. Martha Hedrick executed and delivered this guaranty to the Exchange National Bank in lieu of executing renewal notes as the several notes of her son which the bank then held became due. Mrs. Hedrick knew of the indebtedness of her son to the bank. She must have considered it to be to her advantage to assume the obligation contained in this instrument by reason of which the bank did not press her son for payment or require her signature to the renewal notes, but was content to ~~rely~~ rely upon her guaranty instead, and this benefit to Mrs. Hedrick and the corresponding disadvantage to the bank constituted



necessity of having the mother sign each note on a renewal thereof as they became due. At the time the assets of the Exchange Bank were transferred to the newly organized First National Bank, Mrs. Hedrick gave her father note in order to reduce the indebtedness of her son. In our opinion this guaranty was absolute and unconditional. It recited that Rose Hedrick owed the Exchange Bank \$3250.00 at the time the instrument was signed. It contained an absolute, unqualified guaranty on the part of Mrs. Hedrick to pay the notes evidencing that amount. The notes evidencing these amounts were canceled and surrendered and new instruments extending the time of payment thereof were executed by Rose and accepted by the Bank. This guaranty was assigned, for a valuable consideration, by the Exchange Bank to the First National Bank, and thereafter the First National Bank, relying upon this instrument and being the beneficiary thereof, surrendered to Rose the notes which he had executed to the Exchange Bank, and accepted from him new notes due at future dates. The principal debtor became a bankrupt and the indebtedness having matured, the estate of the guarantor is liable therefor. Any act which is a benefit to one party and a disadvantage to the other is a valid consideration. *Wright v. Wright, 100 Ill. 411; Hedrick v. Exchange Bank, 78 Ill. 300; Lynch v. Hedrick, 142 Ill. 184.* Mrs. Hedrick executed and delivered this guaranty to the Exchange National Bank in lieu of executing renewal notes as the several notes of her son which the bank then held became due. Mrs. Hedrick knew of the indebtedness of her son to the bank. She must have considered it to be a benefit to her son and a disadvantage to the bank. The bank did not press her son for payment or require her signature to the renewal notes, but was content to rely upon her guaranty instead, and this benefit to Mrs. Hedrick and the corresponding disadvantage to the bank constituted

the consideration for the execution of this guaranty.

This instrument of guaranty, while not negotiable, could be assigned so as to give the assignee an equitable title thereto, and it passed as an incident to the assignment of the notes. 28 C. J. 943. Usually the transfer of a debt carries with it, as an incident, all the securities which the assignor may have for its payment. 3 R. C. L. 979. The assignment of these notes by the Exchange Bank to the First National Bank carried with it the guaranty, and vested in the assignee a right to sue upon the guaranty in its own name. Ellsworth v. Harmon, 101 Ill. 274.

The judgment of the Circuit Court is affirmed.

Judgment Affirmed.

The investigation for the execution of this document.

This document is signed, with the signature, which is

assigned as an official seal and assigned as a signature of the President, and

is placed as an official seal of the President of the United States.

1943. Usually the President of the United States is at the President,

all the activities which the President has to do for the President.

U. S. A. 1943. The President of the United States is the President of the

to the Vice President and then carried with it the President, and vessel

to the President is it is so and upon the President in its own name.

Elsworth J. Brown, 1943. 1943.

The President of the United States is Elsworth.

Elsworth J. Brown.



STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



## AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of February, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

274 I.A. 6714

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BE IT REMEMBERED, that afterwards, to-wit: On  
APR 25 1934 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:





IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

October Term, A.D. 1932.

Lawrence H. Williams, Admr. of the  
Estate of Stanley Buches, deceased,  
Plaintiff in Error,

vs.

Error to Circuit Court,  
McHenry County.

Chicago and Northwestern Railway  
Company, a corporation,  
Defendant in error.

HUFFMAN-J.

This writ of error is prosecuted by plaintiff in error, as administrator of the estate of Stanley Buches, from the giving by the trial court of a peremptory instruction at the close of all the evidence, on behalf of the defendant in error.

The case arose out of a railroad crossing accident which occurred in the city of Harvard, in McHenry county, Illinois, on October 24, 1929, at about six o'clock in the evening.

The tracks of defendant in error, hereinafter called defendant, at the crossing in question consisted of two main tracks and seven switch tracks. The main tracks were in the center of the crossing with three switch tracks on one side and four upon the other. State Highway number nineteen and twenty-three intersect and join about one mile south of this crossing. The tracks at the crossing run in an east and west direction and the state highway runs north and south. On the evening in question plaintiff's intestate was driving his automobile north upon the above highway. When he came to this crossing, the same was blocked by a switch engine and a train of freight cars. The deceased brought his car to a stop. Two motor vehicles were between his car and this crossing. The first of these was a truck. Immediately in front of the deceased's car was a

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
October Term, 1930.

Lawrence H. Williams, Adm. of the  
Estate of Stanley Bucher, deceased,  
Plaintiff in Error,

vs.

Chicago and Northwestern Railway  
Company, a corporation,  
Defendant in Error.

Error to Circuit Court,  
DeKalb County.

WITNESSES-3.

This writ of error is prosecuted by plaintiff in error, as administrator of the estate of Stanley Bucher, from the giving by the trial court of a peremptory instruction at the close of all the evidence, on behalf of the defendant in error.

The case arose out of a railroad crossing accident which occurred in the city of Harvard, in McHenry County, Illinois,

on October 24, 1929, at about six o'clock in the evening.

The tracks of defendant in error, hereinafter called defendant, at the crossing in question consisted of two main tracks and seven switch tracks. The main tracks were in the center of the crossing with three switch tracks on one side and four upon the other. State Highway number nineteen and twenty-three intersect and join about one mile south of this crossing. The tracks at the crossing run in an east and west direction and the State Highway runs north and south. On the evening in question plaintiff's intestate was driving his automobile north upon the above highway. When he came to this crossing, the same was blocked by a switch engine and a train of freight cars. The deceased brought his car to a stop. Two motor vehicles were between his car and this crossing. The first of these was a truck. Immediately in front of the deceased's car was a



passenger car. Cars were also lined up on the north side of the crossing, waiting an opportunity to proceed south. Defendant's switch engine was standing with the freight cars upon the main track that is designated as the north main track, upon which east bound traffic was carried. Defendant's main track upon which west bound traffic is carried is on the south side of this track upon which the freight train was standing. This south main track must first be crossed by deceased before he could cross the track upon which the train of freight cars was standing.

Defendant company had a watchman or crossing flagman at this crossing, who was in possession of a red lantern and who was directing traffic at that time. He had stopped the traffic on account of the switch engine and train of freight cars that were then across the crossing. About five minutes after the truck had stopped, the switching crew cut the train of freight cars for the purpose of opening the crossing to traffic. The locomotive pulled the cars to which it was attached, far enough to clear the crossing, whereupon defendant's crossing flagman or watchman, walked out upon the crossing, looked to the east and west, and then with his red lantern signaled the cars on both sides of the crossing to proceed. The three cars upon the south side of the crossing, which were headed by the truck, proceeded to cross over the tracks. The evidence shows that they proceeded together as one car, with about four feet between each car, and that they moved in this manner upon and across the tracks of defendant company. Cars from the north side were crossing to the south. When the deceased reached the defendant's south main track upon which the west bound traffic was carried, his car was struck by a fast passenger train and he was killed. The crossing watchman did not see the approach of this train when he signalled the traffic to proceed across the crossing. He does claim

passenger car. Cars were also lined up on the north side of the crossing, waiting an opportunity to proceed south. Defendant's switch engine was standing with the freight cars upon the main track that is designated as the north main track, upon which east bound traffic was carried. Defendant's main track upon which west bound traffic is carried is on the south side of this track upon which the freight train was standing. This south main track must first be crossed by deceased before he could cross the track upon which the train of freight cars was standing.

Defendant company had a watchman or crossing flagman at this crossing, who was in possession of a red lantern and who was directing traffic at that time. He had stopped the traffic on account of the switch engine and train of freight cars that were then across the crossing. About five minutes after the truck had stopped, the switching crew cut the train of freight cars for the purpose of opening the crossing to traffic. The locomotive pulled the cars to which it was attached, far enough to clear the crossing, whereupon defendant's crossing flagman or watchman, walked out upon the crossing, looked to the east and west, and then with his red lantern signaled the cars on both sides of the crossing to proceed. The three cars upon the south side of the crossing, which were headed by the truck, proceeded to cross over the tracks. The evidence shows that they proceeded together as one car, with about four feet between each car, and that they moved in this manner upon and across the tracks of defendant company. Cars from the north side were crossing to the south. When the deceased reached the defendant's south main track upon which the west bound freight train was standing, the car was struck by a fast passenger train and he was killed. The crossing watchman did not see the approach of this train when he signaled the traffic to proceed across the crossing. He does claim

that he saw the passenger train before it struck the deceased's car and that he blew a whistle and called to the deceased in an effort to warn him. The deceased was then upon the tracks following the cars in front of him. Defendant's crossing watchman was standing upon the west side of the highway, and a car passing directly in front of him from the north side of the crossing to the south, prevented his going to the east side of the highway where the deceased was traveling.

The peremptory instruction was given to the jury on behalf of the defendant upon the grounds that plaintiff's intestate was guilty of such contributory negligence as to bar a recovery. Defendant's servant, the crossing watchman or flagman, in charge of this crossing was there for the purpose of warning traffic of approaching danger. The train of freight cars was cut in order to open this crossing to the traffic that was then passing over the crossing. Upon the cutting of the train of freight cars, defendant's servant walked out into the crossing and looked to see if the tracks were clear, and thereupon gave the signal for traffic to cross. Plaintiff's intestate was in the act of crossing pursuant to the signal of defendant's watchman. In the absence of any independent knowledge of danger upon his part, he had the right to rely upon the directions as given him by defendant's servant, who was stationed there for that particular purpose. C & A Ry. Co. v. Winters 175 Ill. 293, 303; C & A Ry. Co. v. Gore 202 Ill. 188. After a careful review of this case we are of the opinion that sufficient questions of fact were involved as to the negligence of defendant's servant and that of plaintiff's intestate, as to require a submission thereof to a jury.

The motion of the defendant in error herein, the defendant below, for a peremptory instruction should have been denied, and the evidence should have been submitted to the jury.

The judgment is therefore reversed and the cause remanded.

Reversed and remanded.



that he saw the passenger train before it struck the deceased's car and that he blew a whistle and called to the deceased in an effort to warn him. The deceased was then upon the tracks.

Following the case in front of him, Defendant's crossing watchman was standing upon the west side of the highway, and a car passing directly in front of him from the north side of the crossing to the south, prevented his going to the east side of the highway where the deceased was traveling.

The peremptory instruction was given to the jury on behalf of the defendant upon the grounds that Plaintiff's estate was guilty of such contributory negligence as to bar a recovery. Defendant's servant, the crossing watchman on duty, in charge of this crossing was there for the purpose of warning traffic of approaching danger. The train of freight cars was out in order to open this crossing to the traffic that was then passing over the crossing. Upon the setting of the train of freight cars, defendant's servant walked out into the crossing and looked to see if the tracks were clear, and thereupon gave the signal for traffic to cross. Plaintiff's estate was in the act of crossing pursuant to the signal of defendant's watchman. In the absence of any independent knowledge of danger upon his part, he had the right to rely upon the directions as given him by defendant's servant, who was stationed there for that particular purpose. After a careful review of this case we are of the opinion that mistaken questions of fact were involved as to the negligence of defendant's servant and that of Plaintiff's estate, as to require a submission thereof to a jury. The notion of the defendant in error herein, the defendant below, for a peremptory instruction should have been denied, and the evidence should have been submitted to the jury. The judgment is therefore reversed and the cause remanded. Reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*





AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of February, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

274 I.A. 672<sup>1</sup>

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BE IT REMEMBERED, that afterwards, to-wit: On  
APR 25 1934 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

February Term, A.D. 1933.

Luella Hollenbeck and  
Hildegard Hollenbeck,  
Appellees,

vs.

Appeal from County Court,  
Grundy County.

Grundy County National  
Bank,  
Appellant.

HUFFMAN-J.

On January 25, 1932, appellant took judgment by confession in the County Court of Grundy County against William Hollenbeck, upon a note in the principal sum of \$1250. William Hollenbeck and his wife lived on a farm near the city of Seneca. Appellees herein are their two daughters.

Hildegard Hollenbeck works for the Western Electric Co., at Chicago, where she has been employed since 1923. Luella Hollenbeck teaches school in Grundy County, and lives at home with her parents on the farm. She began teaching in September 1928.

Pursuant to the aforesaid judgment by appellant against William Hollenbeck, execution issued and the sheriff levied upon certain livestock, consisting of horses, cows, brood sows, calves, pigs and sheep; and also upon corn, harness, wagons, and divers farming implements. Appellees served notice upon the sheriff that they claimed the ownership to certain of the live stock levied upon, and this case was a trial of the rights of property in such livestock, before the judge of the County Court of Grundy county.

It appears from the evidence offered by appellees that they had advanced money to their mother to the extent of \$330, and that on October 15, 1929, the mother in consideration of the money so advanced by appellees, signed and delivered to them the following paper:



IN THE  
COURT OF GRUNDY COUNTY, MISSISSIPPI  
SECOND DISTRICT

January 25, 1938.

Inelle Hollenbeck and  
Hildegard Hollenbeck,  
Appellees,

vs.  
Grundy County National  
Bank,  
Appellant.

COMES NOW

On January 25, 1938, appellant took judgment by confession in the County Court of Grundy County against William Hollenbeck upon a note in the principal sum of \$1250. William Hollenbeck and his wife lived on a farm near the city of Seneca. Appellees herein are their two daughters.

Hildegard Hollenbeck works for the Western Electric Co., at Chicago, where she has been employed since 1935. Inelle Hollenbeck teaches school in Grundy County, and lives at home with her parents on the farm. She began teaching in September 1936.

Pursuant to the aforesaid judgment by confession against William Hollenbeck, execution issued and the sheriff levied upon certain livestock, consisting of horses, cows, brood sows, calves, pigs and sheep; and also upon corn, harness, wagons, and divers farming implements. Appellees served notice upon the sheriff that they claimed the ownership to certain of the live stock levied upon, and this case was a trial of the rights of property in such livestock, before the Judge of the County Court of Grundy County.

It appears from the evidence offered by appellees that they had advanced money to their mother to the extent of \$250, and that on October 15, 1937, the mother in consideration of the money so advanced by appellees, signed and delivered to them the following

"Seneca, Illinois  
October 15, 1929

Sold to Hildegard and Luella Hollenbeck  
8 head of cows and 2 brood sows for the sum  
of \$830.00 which I have received during the  
last 4 years.

Carrie Hollenbeck."

It is not disputed that appellees advanced the money as claimed. The evidence further shows that appellee, Luella Hollenbeck, advanced money to buy the grey mare named, "Betty." She claims to own this mare and a colt which is an offspring. After hearing the evidence, the court found in favor of appellees with reference to the above mare and colt, seven milk cows and six calves which were offsprings, six brood sows and forty-six pigs, by virtue of the foregoing instrument; and ordered a writ of retorno to issue as to such livestock. Appellant brings this appeal from the judgment of the court herein.

Appellant urges that the bill of sale was invalid, that it should have been acknowledged and recorded, that the same was void as to appellant, that the burden was upon appellees to establish superior title to appellant, and that in this, they failed. On a trial of the right of property under the statute, the burden is upon appellees to prove their right to the property, and they are bound to show that the property belongs to them and is not subject to sale upon execution. Appellees stated positively that this livestock belonged to them. It appears that the farm upon which they lived belonged to the mother. No one disputes the mother's ownership of the animals covered by her bill of sale, and no one disputes Luella's claim that she advanced the money with which to purchase the grey mare.

It appears by appellant's evidence that the father, William Hollenbeck, made a property statement to appellant on January 31, 1931, showing a net worth of \$7395, and that the sum of \$1653 in such statement was represented by livestock. There is nothing to

"Geneseo, Illinois  
October 18, 1932

Sold to William and Luella Hollenbeck  
8 head of cows and 2 brood sows for the sum  
of \$830.00 which I have received during the  
last 4 years.

Garrie Hollenbeck."

It is not disputed that appellees advanced the money as  
claimed. The evidence further shows that appellee, Luella

Hollenbeck, advanced money to buy the grey mare named, "Betty."  
She claims to own this mare and a colt which is an offspring.

After hearing the evidence, the court found in favor of appellees  
with reference to the above mare and colt, seven milk cows and  
six calves which were offspring, six brood sows and forty-six  
pigs, by virtue of the foregoing instrument; and ordered a writ  
of return to issue as to such livestock. Appellant brings this

appeal from the judgment of the court herein.

Appellant urges that the bill of sale was invalid, that it

should have been acknowledged and recorded, that the same was

void as to appellant, that the burden was upon appellees to

establish superior title to appellant, and that in this, they

failed. On a trial of the right of property under the statute,

the burden is upon appellees to prove their right to the property.

and they are bound to show that the property belongs to them and

is not subject to sale upon execution. Appellees stated positively

that this livestock belonged to them. It appears that the farm upon

which they lived belonged to the estate. No one disputes that

ownership of the animals covered by her bill of sale, and no one

disputes Luella's claim that she advanced the money with which to

purchase the grey mare.

It appears by appellant's evidence that the father, William

Hollenbeck, made a property statement to appellant on January 31,

1931, showing a net worth of \$7500, and that the sum of \$1000

was advanced to appellant by livestock. Appellant claims to



show that appellees had any notice or knowledge of this property statement made by William Hollenbeck to appellant. The bill of sale from the mother to appellees for the livestock in question was made on October 15, 1929. The note upon which judgment was taken against the father was dated October 26, 1931. The execution of the bill of sale by the mother to appellees was too remote to the execution of the note by the father, to attribute a wrongful intention on the part of the mother and appellees.

Appellees both received a substantial monthly salary. It is not unusual that they should advance money to their mother as claimed in this case, nor is it uncommon for them to leave the livestock together with its offspring, upon the farm.

The trial court saw the witnesses and heard them testify. Appellant offered no evidence to impugn the acts and conduct of the mother and appellees. Appellees swore the animals in question belonged to them, and no witness disputes their claim. Upon the whole of the record we are not prepared to say that the judgment of the trial court is contrary to the law or against the weight of the evidence.

The judgment of the County Court of Grundy County is therefore affirmed.

Judgment affirmed.

that appellee had any notice or knowledge of this property  
statement made by William Hollenback to appellee. The bill of  
sale from the mother to appellee for the property in question  
was made on October 15, 1929. The note upon which judgment was  
taken against the father was dated October 22, 1921. The execution  
of the bill of sale by the mother to appellee was too remote to  
the execution of the note by the father, to attribute a wrongful  
intention on the part of the mother and appellee.

Appellee also presented a substantial defense. It is  
not unusual that they would believe what is said by them as  
evidence in this case, nor is it unusual for them to leave the  
livestock together with its offspring, upon the farm.  
The trial court saw the witnesses and heard their testimony.  
Appellant offered no evidence to impugn the acts and conduct of  
the mother and appellee. Appellee made the evidence in dispute  
belong to them, and no witness disputes their claim. Upon the  
whole of the record as it was presented to the jury the judgment  
of the trial court is correct and the law of the case is  
of the evidence.

The judgment of the trial court is hereby affirmed.  
This is affirmed.

STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*





AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of February, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

274 I.A. 672<sup>2</sup>

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BE IT REMEMBERED, that afterwards, to-wit: On

APR 25 1934 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:





IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

February Term, A.D. 1934.

Harris Brothers Company,  
a Delaware Corporation,

Appellant,

vs.

Appeal from Circuit Court,  
Will County.

Hinkamp & Company, et al.,

Appellees.

HUFFMAN-J.

Appellant on June 25, 1930, filed its bill in the Circuit Court of Will county, to foreclose a mechanics lien. The matter remained on the docket without a hearing until on May 8, 1931, when appellees filed their motion to require appellant to obtain service on Hinkamp & Co., and on other necessary parties, within such time that the court might have the jurisdiction to proceed with the hearing of the cause during the September term, 1931, thereof, and that upon failure of appellant to so complete service as aforesaid, the bill be dismissed as without equity. The court entered its order directing appellant to obtain service as prayed in appellees' motion.

On October 13, 1931, the court found that appellant had failed to complete service on Hinkamp & Co., as previously ordered on May 8th., and dismissed the bill of complaint as without equity. Appellant thereafter filed its petition to vacate the above order dismissing its bill. Upon motion of appellees made on February 2, 1933, the petition of appellant as above filed, was set for hearing on February 13, 1933. Upon a hearing of the matter on that date, the court took same under advisement and on June 7, 1933, entered its order denying the petition of appellant to vacate the order of court entered on October 13, 1931, dismissing the bill of complaint

APPELLATE COURT OF THE DISTRICT OF COLUMBIA

Appellee, a Delaware Corporation,

Appellant from Circuit Court,  
Will County.

vs.

Hinkamp & Company, et al.,

Appellees.

HUTCHMAN-7.

Appellant on June 25, 1930, filed its bill in the Circuit

Court of Will County, to foreclose a mortgage lien. The

matter remained on the docket without a hearing until on May 3,

1931, when appellees filed their motion to require appellant

to obtain service on Hinkamp & Co., and on other necessary

parties, within such time that the court might have the jurisdiction-

to proceed with the hearing of the cause during the September

term, 1931, thereof, and that upon failure of appellant to so

complete service as aforesaid, the bill be dismissed as without

equity. The court entered its order directing appellant to

obtain service as prayed in appellees' motion.

On October 13, 1931, the court found that appellant had

failed to complete service on Hinkamp & Co., as previously

ordered on May 8th, and dismissed the bill of complaint as

without equity. Appellant thereafter filed its petition to

vacate the above order dismissing its bill. Upon motion of

appellees made on February 2, 1932, the petition of appellant

as above filed, was set for hearing on February 13, 1932.

Upon a hearing of the matter on that date, the court took

same under advisement and on July 7, 1932, entered its order

denying the petition of appellant to vacate the order of court

entered on October 13, 1931, dismissing the bill of complaint

as without equity. Appellant excepted to this ruling and prosecutes this appeal.

Appellant insists that this appeal is directed toward the dismissing of the suit for failure to prosecute with diligence. Appellees insist that the only question for review is the order of the court refusing to vacate a previous order, and that this is the only alleged error covered by appellant's assignment of errors. Appellant assigns error that the denial of its motion to set aside the dismissal order of October 13th., was an abuse of the court's judicial discretion.

The motion of appellees filed on May 8, 1931, to compel appellant to complete service was made under sec. 11 of the Lien Act, and the order entered thereon was entered pursuant to such section of said act. The pertinent portion of this section provides as follows: "The complainant or petitioner shall make all parties interested, of whose interest he is notified or has knowledge, parties defendant, and summons shall issue and service thereof be had as in suits in chancery; and when any defendant resides or has gone out of the state, or on inquiry can not be found, or is concealed within this state, so that process can not be served on him, the complainant or petitioner shall cause a notice to be given to him in like manner and upon the same conditions as is provided in suits in chancery, and his failure to so act with regard to summons or notice shall be ground for judgment or decree against him as upon the merits. The same rule shall prevail with cross-petitioners with regard to any person of whose interest they have knowledge, and who are not already parties to the suit or action." Sec. 21, ch. 110 Cahill's St. 1931, contains a somewhat similar provision in regard to suits in equity.



as without equity. Appellant objected to this ruling and

protested this appeal.

Appellant insists that this appeal is directed toward

the dismissal of the writ for failure to prosecute with diligence. Appellee insists that the only question for review is the order of the court refusing to vacate a previous order, and that this is the only alleged error covered by appellant's assignment of errors. Appellant assigns error that the denial of its motion to set aside the dismissal order of October 1934,

was an abuse of the court's judicial discretion.

The motion of appellee filed on May 8, 1935, to compel

appellant to complete service was made under sec. 11 of the then Act, and the order entered thereon was entered pursuant to such section of said Act. The pertinent portion of this section provides as follows: "The complainant or petitioner shall make all parties interested, of whose interest he is notified or has knowledge, parties defendant, and summons shall issue and service thereof be had as in writs in chancery; and when any defendant resides or has gone out of the state, or on inquiry can not be found, or is concealed within this state, so that process can not be served on him, the complainant or petitioner shall cause a notice to be given to him in like manner and upon the same conditions as is provided in writs in chancery, and his failure to so act with regard to summons or notice shall be ground for judgment or decree against him as upon the merits. The same rule shall prevail with respect to petitioners with regard to any person of whose interest they have knowledge, and who are not already parties to the writ or action." Sec. 11, ch. 110 Civil Code, 1931, contains a somewhat similar provision in regard to writs in equity.

The substance of appellant's contentions is that the Court in its dismissal of this action was guilty of an abuse of judicial discretion. To go into a discussion of the dispute of the parties herein upon this question would unduly extend this opinion and serve no good purpose. We have examined the record and the evidence in this respect, and we do not find therefrom that the trial court committed an abuse of its discretion, as claimed by appellant. Courts must necessarily be clothed with some latitude in handling the business that comes before them; and in the dispatch of such business, matters within the discretionary powers of the court, will not be interfered with upon review, unless an abuse of such discretion appears to have been committed. The authorities on this point are abundant.

Finding no reversible error in the record, the order and decree of the trial court is affirmed.

Order and decree affirmed.

The absence of a certain discretion in the  
Court in its disposal of this action for injury to the  
of personal character. It is also a discretion in the  
of the action for injury to the character of the  
this action and not a mere question of law. We have examined the  
record and the evidence in this respect, and we do not find  
therefrom that the trial court committed an error of law  
discretion, as claimed by appellant. Courts must necessarily  
be clothed with some latitude in handling the business that  
comes before them; and in the dispatch of such business,  
matters within the discretionary powers of the court, will  
not be interfered with upon review, unless an abuse of such  
discretion appears to have been committed. The authorities  
on this point are abundant.  
Finding no reversible error in the record, we order the  
judgment of the trial court affirmed.  
That the parties stipulated.



STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



1934  
AT A TERM OF THE APPELLATE COURT, 17

Begun and held at Ottawa, on Tuesday, the sixth day of February, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

274 I.A. 672<sup>3</sup>

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BE IT REMEMBERED, that afterwards, to-wit: On  
APR 25 1934 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:





IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

February Term, A.D. 1934.

M. H. Fitzsimmons,

Appellee,

vs.

Appeal from Circuit Court,  
McHenry County.

William Cowan, et al.,  
(Fred Siebel,

Appellant)

HUFFMAN-J.

This appeal is prosecuted by appellant from the order of the Circuit Court of McHenry county entered therein pursuant to the mandate and specific directions of the appellate Court, wherein this cause was reversed and remanded with directions, in the case of M. H. Fitzsimmons, appellee, v. William Cowan, et al., defendant, Fred Siebel, appellant, 263 Ill. App. 660. The question in that appeal was the disposition of the sum of \$1107.96 held by the Master, and for which appellant and the McHenry County State Bank, (now Woodstock National Bank) were contending.

The only question involved in this appeal is whether the lower court entered its decree in conformity with the mandate and directions of the Appellate Court, as made at the time this case was reversed and remanded as aforesaid.

In the opinion of the Appellate Court reversing and remanding this cause, it was provided that appellant should receive from the master the sum of \$1000, and also the value of the dower right of Maggie Cowan in the balance of \$107.96, and that the lower court determine the value of such dower right by reference to standard mortality tables. The dower right was fixed and determined at \$35.98, and no complaint

IN THE  
COURT OF APPEALS  
FOR THE STATE OF NEW YORK  
JANUARY TERM, A.D. 1934.

M. H. Fitzsimmons,

Appellant from Circuit Court,  
Schenectady County.

William Cowan, et al.,  
(Fred Siebel,  
Appellant)

THE COURT:

This appeal is prosecuted by appellant from the order of the Circuit Court of Schenectady County entered therein pursuant to the mandate and specific directions of the Appellate Court, wherein this cause was reversed and remanded with directions, in the case of M. H. Fitzsimmons, appellee, v. William Cowan, et al., defendant, Fred Siebel, appellant, 283 Ill. App. 380. The question in that appeal was the disposition of the sum of \$107.98 held by the Master, and for which appellant and the Schenectady State Bank, (now Woodstock National Bank) were contending.

The only question involved in this appeal is whether the lower court entered its decree in conformity with the mandate and directions of the Appellate Court, as made at the time this case was reversed and remanded as aforesaid.

In the opinion of the Appellate Court reversing and remanding this cause, it was provided that appellant should receive from the Master the sum of \$1000, and also the value of the lower right of Maggie Cowan in the balance of \$107.98, and that the lower court determine the value of such lower right by reference to standard mortality tables. The lower right was fixed and determined at \$33.98, and no complaint



is made of the computation of this item. Appellant objects herein because of the fact that the Circuit Court of McHenry county in entering its decree under the directions of the opinion of the Appellate Court, did not allow said appellant interest upon the above sum of money.

We have examined the opinion of the Appellate Court in the above case wherein this cause was reversed and remanded with directions to the lower court, and the mandate as issued therein. There is no provision for the payment of any money to appellant under the decree to be entered by the said Circuit Court, except the sum of \$1000 and the said Maggie Cowan's dower right in the balance of \$107.96.

Where a judgment is reversed and the cause is remanded, with specific directions as to the action to be taken by the trial court, it is the duty of that court to follow those directions, and it cannot err in doing so. Trustees of Schools v. Hoyt, 318 Ill. 60. Upon appeal from the decree of a lower court so entered, the only question presented on such appeal, is whether the decree is in accordance with the mandate and directions of the court of review. Trustees of Schools v. Hoyt, supra; Smith v. Dugger 318 Ill. 215; Wolkau v. Wolkau 217 Ill. App. 471, 474; Dunlap v. Pierce, 260 Ill. App. 149, 154; Ry. Equipment Co. v. Brake-Beam Co., 239 Ill. 111, 115.

From an examination of the opinion of the Appellate Court entered in the above case, we find that the lower court was directed to enter its decree providing for the payment of \$1000 to said appellant, together with the dower interest as aforesaid in the sum of \$107.96, which amounts were the final balances found to be due to said appellant. The Circuit Court had no power to enter any other decree.

The judgment of the Circuit Court, merely carrying into execution the judgment of the Appellate Court, was the only judgment which the Circuit Court had any authority to enter, and the same is affirmed.

Judgment affirmed.

is made of the computation of this item. Appellant objects  
herein because of the fact that the Circuit Court of Missouri  
county in entering its decree under the direction of the  
opinion of the Appellate Court, did not allow said appellant  
interest upon the above sum of money.

We have examined the opinion of the Appellate Court in  
the above case wherein this cause was reversed and remanded  
with directions to the lower court, and the mandate as issued  
therein. There is no provision for the payment of any money  
to appellant under the decree to be entered by the said Circuit  
Court, except the sum of \$1000 and the said Maggie Cowan's  
dower right in the balance of \$107.96.

Where a judgment is reversed and the cause is remanded,  
with specific directions as to the action to be taken by the  
trial court, it is the duty of that court to follow those  
directions, and it cannot act in doing so. Trustees of Schools  
v. Hoyt, 218 Ill. 80. Upon appeal from the decree of a lower  
court as entered, the only question presented on such appeal,  
is whether the decree is in accordance with the mandate and  
directions of the court of review. Trustees of Schools v.  
Hoyt, 218 Ill. 80. In the case of Trustees of Schools v. Hoyt,  
218 Ill. 80, 477, 478, 479, 480, 481, 482, 483, 484, 485,  
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979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991,  
992, 993, 994, 995, 996, 997, 998, 999, 1000.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*





9-3  
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of February, in  
the year of our Lord one thousand nine hundred and thirty-four,  
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

274 I.A. 6724

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BE IT REMEMBERED, that afterwards, to-wit: On

APR 25 1934 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:





IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

February Term, A.D. 1934.

A. L. Fogle, Receiver,

Defendant in Error,

vs.

Error to Circuit Court,  
Ogle County.

Charles E. Hayes,

Plaintiff in Error.

HUFFMAN-J.

Defendant in error was appointed receiver in a foreclosure proceeding for a certain eighty acre tract of land. He qualified as such receiver. This land at the time was rented to a tenant by the name of King, who had the premises rented for the period from March 1, 1931, to March 1, 1932, at the sum of \$5.00 per acre, cash rental. King sold his crops upon this tract of land to plaintiff in error in June 1931. King had not paid the rent. The evidence shows the rent was to be paid in two equal installments.

Defendant in error called upon plaintiff in error about the payment of this rent upon several occasions, at which times he discussed with plaintiff in error the payment of the same. He states that plaintiff in error said that he was to pay the rent but it wasn't due yet; that it was cash rent of \$5.00 an acre making a total of \$400. Defendant in error claims that plaintiff in error agreed upon various times he would pay the rent, that half would be due December 1, 1931, and half due March 1, 1932. It appears from the evidence that plaintiff in error later refused to pay defendant in error the rent, claiming that he had no information or proof that defendant in error was the receiver and entitled to collect same. The evidence shows that defendant in

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

January Term, A.D. 1932.

W. H. Fogie, Receiver,

Defendant in Error,

vs.  
Error to Circuit Court.

vs.

Charles A. Hayes,

Plaintiff in Error.

RECEIVED

Defendant in error was appointed receiver in a foreclosure proceeding for a certain eighty acre tract of land. He qualified as such receiver. This land at the time was rented to a tenant by the name of King, who had the premises rented for the period from March 1, 1931, to March 1, 1932, at the sum of \$5.00 per acre, cash rental. King sold his crops upon this tract of land to plaintiff in error in June 1931. King had not paid the rent. The evidence shows the rent was to be paid in two equal installments.

Defendant in error called upon plaintiff in error about the payment of this rent upon several occasions, at which times he discussed with plaintiff in error the payment of the same. He states that plaintiff in error said that he was to pay the rent but it wasn't due yet; that it was cash rent of \$5.00 an acre making a total of \$400. Defendant in error claims that plaintiff in error agreed upon various times he would pay the rent, that half would be due December 1, 1931, and half due March 1, 1932. It appears from the evidence that plaintiff in error later refused to pay defendant in error the rent, claiming that he had no information or proof that defendant in error was the receiver and entitled to collect same. The evidence shows that defendant in

error then submitted his credentials to plaintiff in error at which time plaintiff in error deferred payment stating that he did not know whether defendant in error was the proper party to whom he should pay the rent. The evidence shows repeated trips by defendant in error to see plaintiff in error, and conversations between them regarding the payment of this rent.

Plaintiff in error received the crops but did not pay the rent, and his testimony upon the trial of this cause is highly unsatisfactory as to any reason for not paying it. He claims that defendant in error upon his visits, "never threatened to go into court," with the account. The rent was not paid and the plaintiff in error offered no legal reason why he should not pay it.

This suit was originally instituted in a Justice of the Peace court where defendant in error herein, recovered a judgment for the sum of \$400 as rent upon these premises. Plaintiff in error herein, appealed from that judgment to the Circuit Court of Ogle County, where a jury was waived and the cause was tried before the Court. The Court rendered judgment in favor of defendant in error and against plaintiff in error for \$400 and costs. From an examination of this record we are of the opinion that the judgment of the trial court was correct, and the same is hereby affirmed.

Judgment affirmed.



error then admitted his credence to plaintiff in error  
at which time plaintiff in error deferred payment stating  
that he did not know whether defendant in error was the proper  
party to whom he should pay. The plaintiff in error  
peated trips by defendant in error to see plaintiff in error,  
and conversations between them regarding the payment of this rent.  
Plaintiff in error received the crops but did not pay the  
rent, and his testimony upon the trial of this case is highly  
unreliable as to any reason for not paying it. He claims  
that defendant in error upon his visits, "never threatened to  
go into court," with the account. The rent was not paid and  
the plaintiff in error offered no legal reason why he should not  
pay it.

This suit was originally instituted in a Justice of the  
peace court where defendant in error herein, recovered a judgment  
for the sum of \$400 as rent upon these premises. Plaintiff in  
error herein, appealed from that judgment to the Circuit Court  
of this County, where a jury was waived and the same was tried  
before the Court. The Court rendered judgment in favor of  
defendant in error and against plaintiff in error for \$400  
and costs. Upon an examination of this record we are of the  
opinion that the judgment of the trial court was correct, and  
the same is hereby affirmed.

JOSEPH W. BROWN, JR.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_.

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*Clerk of the Appellate Court*





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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of February, in  
the year of our Lord one thousand nine hundred and thirty-four,  
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

274 I.A. 672<sup>5</sup>

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BE IT REMEMBERED, that afterwards, to-wit: On  
APR 25 1934 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

February Term, A.D. 1934.

Leslie C. Morgan, Supervisor for  
and on behalf of Township of Bonus,  
Boone County, Illinois,  
Appellee,

vs.

Appeal from the Circuit  
Court, Boone County.

The Estate of A. Gates White,  
Deceased,  
Appellant.

HUFFMAN-J.

A. Gates white, deceased, had been a former supervisor of the township of Bonus, in Boone County, Illinois, and as such officer had custody and charge of the township funds and of the road and bridge funds of said town. He died, having in his possession a balance of \$3698.95, belonging to said township. Appellee herein succeeded said deceased as supervisor of said township, and appellee as such supervisor for and on behalf of said township filed a claim against the estate of said deceased for \$2838.25, being the above amount less a credit of \$860.70 received from said estate.

There is no dispute that the deceased had the money in his hands at the time of his death. The only question involved in this case is whether the claim as filed by appellee, in his capacity as supervisor for and on behalf of said township of Bonus, was sufficient to entitle the court to allow same against said estate. The claim was filed by appellee in the County Court of said county, in words and figures as follows:

"IN THE  
COUNTY COURT OF BOONE COUNTY  
September Term, A.D. 1931  
In Probate

State of Illinois : ss  
County of Boone :



IN THE  
COURT OF BOONE COUNTY  
September Term, A.D. 1931

Leslie C. Morgan, Supervisor for  
and on behalf of Township of Boone,  
Boone County, Illinois,

Appel from the Circuit  
Court, Boone County,

The Estate of A. Gates White,  
Deceased,  
Appellant.

DEFENDANT.

A. Gates White, deceased, had been a former supervisor of the township of Boone, in Boone County, Illinois, and as such officer had custody and charge of the township funds and of the road and bridge funds of said town. He died, having in his possession a balance of \$2938.25, belonging to said township. Appellee herein succeeded said deceased as supervisor of said township, and appellee as such supervisor for and on behalf of said township filed a claim against the estate of said deceased for \$2938.25, being the above amount less a credit of \$239.70 received from said estate.

There is no dispute that the deceased had the money in his hands at the time of his death. The only question involved in this case is whether the claim as filed by appellee, in his capacity as supervisor for and on behalf of said township of Boone, was sufficient to entitle the court to allow same against said estate. The claim was filed by appellee in the County Court of said county, in words and figures as follows:

IN THE  
COURT OF BOONE COUNTY  
September Term, A.D. 1931  
In Probate

State of Illinois : ss  
County of Boone :

Leslie C. Morgan, supervisor for and on behalf of the Township of Bonus, Boone County, Illinois, being duly sworn on oath says that the annexed claim against the estate of A. Gates White, deceased, amounting to the sum of \$2,838.25 is just after allowing all just claims, and is now due and unpaid

Leslie C. Morgan

Subscribed and sworn to before me  
this 21st day of September, A.D. 1931  
(Seal)

Alexander J. Strom  
Notary Public  
Boone Co. Ill.

The above claim referred to in said affidavit is founded as follows: To amount of trust funds entrusted to said decedent, who was for a number of years supervisor for said township, county, and State, and at the time of his death had said funds in his possession belonging to said township as follows:

|                           |            |
|---------------------------|------------|
| Township fund.....        | \$2,457.27 |
| Road and bridge fund..... | 1,261.68   |
| Total .....               | \$3,698.95 |

Less credit received from the estate of A. Gates White which has been credited on the township fund, said payment was in the sum of \$860.70, leaving the account as follows:

|   |             |
|---|-------------|
| Due trust fund on account of the road and bridge fund ..... | \$1,261.68  |
| Balance due on trust fund on account of township fund ..... | 1,576.57    |
| Total .....   | \$2,838.25" |

Objections were made to the claim in the County Court by the Second National Bank of Belvidere, which claimed to have judgments amounting to \$4418.33; and by the Peoples Bank of Belvidere, which claimed to have a judgment for \$2782; and by the Keene Belvidere Canning Co., which claimed to have a judgment of \$9830.72; and by the Farmers State Bank of Belvidere, which had filed a claim against said estate to the sum of \$15,000; and by the administrator of the estate of the said A. Gates White, deceased. The position of the objectors was that there was nothing in said claim to show who presented it or upon whose behalf it was presented; and further challenging the right of appellee to file the claim for and on behalf of the township, and urging that the same was improperly filed and should have been filed in the name of

Leslie C. Norton, supervisor for and on behalf of the Township of Boone, Boone County, Illinois, being duly sworn on oath, says that the annexed account against the estate of A. Gates White, deceased, amounting to the sum of \$2,838.38 is just after allowing all just claims, and is now due and unpaid.

Subscribed and sworn to before me  
this 11th day of November, A.D. 1901

Alexander L. Stron  
Notary Public  
Boone Co. Ill.

The above claim referred to in said affidavit is founded as follows: To amount of trust funds entrusted to said decedent, who was for a number of years supervisor for said township, county, and State, and at the time of his death had said funds in his possession belonging to said township as follows:

|                           |            |
|---------------------------|------------|
| Township fund.....        | \$2,437.37 |
| Road and bridge fund..... | 1,321.68   |
| Total.....                | \$3,759.05 |

Less credit received from the estate of A. Gates White which has been credited on the township fund, said account being the sum of \$920.70, leaving the account as follows:

|  |            |
|--|------------|
| Due trust fund on account of the road and bridge fund..... | \$1,321.68 |
| Balance due on trust fund on account of township fund..... | 1,437.37   |
| Total.....   | \$2,759.05 |

Objections were made to the claim in the County Court by the Second National Bank of Belvidere, which claimed to have judgments amounting to \$4418.38; and by the Peoples Bank of Belvidere, which claimed to have a judgment for \$2982; and by the Keene Belvidere Canning Co., which claimed to have a judgment for \$2080.75; and by the Farmers State Bank of Belvidere, which had filed a claim against said estate for the sum of \$25,000; and by the administrator of the estate of the said A. Gates White, deceased. The position of the objectors was that there was nothing in said claim to show who presented it or upon whose behalf it was presented; and further challenging the right of appellee to file the claim for and on behalf of the township, and urging that the same was improperly filed and should have been filed in the name of



the Township of Bonus. The County Court allowed the claim as of the fourth class. The objectors took an appeal to the Circuit Court of said county. The Circuit Court allowed the claim as of the fourth class, to be paid in due course of administration. The above objectors have now brought this appeal from the judgment of the Circuit Court of Boone County.

An examination of the claim and affidavit as made thereto by appellee in this case, leaves no question as to the purpose of the filing of the claim, or upon whose behalf the claim is filed. It sets out the amounts the deceased supervisor had, both in the road and bridge fund and in the township fund, at the time of his death. It further appears from the claim that these were, "trust funds entrusted to said decedent, who was for a number of years supervisor for said township, county, and state, and at the time of his death had said funds in his possession belonging to said township \*\*\*."

Appellee is the proper custodian of the money due under the claim filed herein. A question similar to the one now urged by appellant, that all suits or proceedings of this kind and character must be brought in the name of the town, was under consideration in the case of Highway Comrs. v. Bloomington, 253 Ill. 164. The court with reference to this question on page 167 of its opinion uses the following language: "The appellant contends that this suit was improperly brought in the name of the commissioners of highways; that the suit should have been brought either in the name of the town, under paragraph 46 of chapter 139 of Hurd's Statutes of 1909, or in the name of the township treasurer, for the reason that the money, being public funds belonging to the township, would be payable to such treasurer. There is no force in this objection. The township is the beneficial plaintiff and real claimant of the money sued for. A recovery of a judgment and a satisfaction thereof in the present action would be a bar to any further action, either in the name of the town or any other agent thereof, for this cause of action."

the Township of Boone. The County Court allowed the claim as of the fourth class. The objectors took an appeal to the Circuit Court of said county. The Circuit Court allowed the claim as of the fourth class, to be paid in due course of administration. The above objectors have now brought this appeal from the judgment of the Circuit Court of Boone County.

An examination of the claim and affidavit as made thereto by appellee in this case, leaves no question as to the purpose of the filing of the claim, or upon whose behalf the claim is filed. It sets out the amounts the deceased supervisor had, both in the road and bridge fund and in the township fund, at the time of his death. It further appears from the claim that these were "trust funds entrusted to said deceased, who was for a number of years supervisor for said township, county, and state, and at the time of his death had said funds in his possession belonging to said township \*\*\*."

Appellee is the proper custodian of the money due under the claim filed herein. A question similar to the one now urged by appellant, that all suits or proceedings of this kind and character must be brought in the name of the town, was under consideration in the case of Highway Comrs. v. Bloomington, 255 Ill. 184. The court with reference to this question on page 187 of its opinion uses the following language: "The appellant contends that this suit was improperly brought in the name of the commissioners of highways; that the suit should have been brought either in the name of the town, under paragraph 46 of chapter 139 of Burns' Statutes of 1909, or in the name of the township treasurer, for the reason that the money, being public funds belonging to the township, would be payable to such treasurer. There is no force in this objection. The township is the beneficial plaintiff and real claimant of the money sued for. A recovery of a judgment and satisfaction thereof in the present action would be a bar to any further action, either in the name of the town or any other agent thereof, for this cause of action."

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Furthermore we do not understand that the presentation of a claim against an estate need conform to common law practice or be presented in the technical legal form which applies to suits at law. Thomson v. Black, 200 Ill. 465, 468.

Some criticism might be offered as to the form and manner in which the claim filed herein, was drawn; but as above stated we do not understand that the same strictness is required in a proceeding of this kind with reference to the technical manner and form of the written claim, as is required in suits at law. There can be no doubt as to the purpose of the claim and upon whose behalf it is filed. We are of the opinion that a payment and satisfaction of this claim, would be a bar to any further action, either in the name of the town or any other agent thereof.

The judgment of the Circuit Court of Boone County is affirmed.

Judgment affirmed.



Furthermore we do not understand that the presentation of  
an affidavit against an estate need conform to common law practice  
or be presented in the technical legal form which applies to  
affidavits of law. *Thompson v. Black*, 200 Ill. 488, 489.  
Some criticism might be offered as to the form and manner  
in which the claim filed herein, was drawn; but as above stated  
we do not understand that the same strictness is required in a  
proceeding of this kind with reference to the technical manner  
and form of the written claim, as is required in affidavits of law.  
There can be no doubt as to the purpose of the claim and upon  
which it is based. In fact the opinion that a person  
and satisfaction of this claim, would be a bar to any further  
action, either in the State or in any other court, is affirmed.  
The judgment of the Circuit Court of Boone County is affirmed.

Very truly yours,

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*





AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of February, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

274 I.A. 673<sup>1</sup>

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BE IT REMEMBERED, that afterwards, to-wit: On  
APR 25 1934 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

February Term, A.D. 1934.

William C. Hubbell, and the  
First National Bank of  
Libertyville, a corporation,  
Trustee,

Appellant

Appeal from Circuit Court,  
Lake County.

vs.

Mary C. DeVault, et al.,

Appellees.

HUFMAN-J.

This is an action brought by appellees to foreclose a trust deed and five notes secured thereby, executed by appellants. The trust deed and notes bore date of August 12, 1928, and were due three years after date.

The defense urged by appellants upon the hearing of this cause, was that each of the five notes after its execution by appellants, had been materially altered and changed by appellees, or some one on their behalf and at their direction, without appellants' knowledge or consent; by causing to be stamped upon the face of each of said notes the following words: "The makers hereof reserve the privilege of paying this note on any interest day, upon giving to the trustee sixty days previous notice in writing and paying a premium of 2% of the amount of the principal thereof." The above statement was stamped upon each note by way of a rubber stamp, and was placed on each note immediately above the first line provided for the signature of the said makers. Mary C. DeVault was the first signer upon each note and her signature extends into and through the wording place thereon by the rubber stamp. It is insisted by appellants



IN THE  
COURT OF THE COMMON PLEAS  
FOR THE COUNTY OF LIBERTY  
WEST VIRGINIA  
JANUARY TERM, 1928.

William C. Hubbell, and the  
First National Bank of  
Libertyville, a corporation,  
Plaintiffs,

vs.  
Mary C. DeVault, et al.,  
Defendants.

vs.

Mary C. DeVault, et al.,

Defendants.

HUTTENBACH-1.

This is an action brought by appellees to foreclose a trust deed and five notes secured thereby, executed by appellants. The trust deed and notes bore date of August 12, 1928, and were due three years after date.

The defense urged by appellants upon the hearing of this cause, was that each of the five notes after its execution by appellants, had been materially altered and changed by appellees, or some one on their behalf and at their direction, without

appellants' knowledge or consent; by causing to be stamped upon the face of each of said notes the following words: "The makers hereto reserve the privilege of paying this note on any interest day, upon giving to the trustee sixty days previous notice in writing and paying a premium of 2% of the amount of the principal thereof." The above statement was stamped upon each note by way of a rubber stamp, and was placed on each note immediately above the first line provided for the signature of the said makers. Mary C. DeVault was the first signer upon each note and her signature extends into and through the wording place thereon by the rubber stamp. It is insisted by appellants

that this red stamp placed upon each note as aforesaid is superimposed upon the signature of the said Mary C. DeVault, thereby demonstrating the fact that the said stamp had been placed upon the several notes after their execution. The color of the rubber stamp upon the notes is referred to by appellants as red. It is in fact of a purple color, but for convenience herein we shall hereafter refer to the same as red. Appellants urged that by virtue of Secs. 145 and 146 ch. 98 Cahill's St. 1931, the alleged alteration rendered the notes and trust deed void, and therefore they are not liable thereunder.

The cause was heard by the Chancellor and he decreed foreclosure as prayed. Appellants prosecute this appeal ~~using~~ for reversal the above alleged alteration of the notes by the placing of the red stamp thereon.

Complainants' exhibit nine was an application for loan of five thousand dollars for three years and contained the following clause: "Prepayments: any note callable at 102 on any interest date on sixty days prior notice." Complainants' exhibit ten was the application for extension of this loan, signed by appellants and contained the following clause: "Prepayments: any note callable at 102 on any interest date on sixty days prior notice." An extension agreement was entered into pursuant to the above application therefor.

The trust deed herein was mailed to Helmer, Molten, Whitman, and Holten, attorneys, in Chicago, for execution. It was recorded before it was returned to the office of appellees. The notes were mailed directly to Mrs. Mary C. DeVault, in Chicago, and she returned them to the office of appellees, in person. From the time the trust deed and notes were prepared and mailed as above, for execution, they were never back in the office of appellees, or in the hands of any one representing appellees, until after they had been executed, and the trust deed recorded.

The trust deed recites: "The grantors herein reserve the

that this red stamp placed upon each note as aforesaid is exposed upon the signature of the said Mary C. DeVallet, thereby demonstrating the fact that the said stamp had been placed upon the several notes after their execution. The color of the rubber stamp upon the notes is referred to by appellants as red. It is in fact of a purple color, but for convenience herein we shall hereafter refer to the same as red. Appellants urged that by virtue of Secs. 145 and 146 ch. 28 Civil Code, 1901, the alleged alteration rendered the notes and trust deed void, and therefore they are not liable thereunder.

The cause was heard by the Chancellor and he decreed: For-  
closure as prayed. Appellants prosecute this appeal urging for reversal the above alleged alteration of the notes by the placing of the red stamp thereon.

Complainants' exhibit nine was an application for loan of five thousand dollars for three years and contained the following clause: "Prepayment: any note redeemable at 102 on any interest date on sixty days prior notice." Complainants' exhibit ten was the application for extension of this loan, signed by appellants and contained the following clause: "Prepayment: any note redeemable at 102 on any interest date on sixty days prior notice." An extension agreement was entered into pursuant to the above

application therefor.

The trust deed herein was mailed to Helmer, Koltzen, Whitman, and Koltzen, attorneys, in Chicago, for execution. It was recorded before it was returned to the office of appellees. The notes were mailed directly to Mrs. Mary C. DeVallet, in Chicago, and she returned them to the office of appellees, in person. From the time the trust deed and notes were prepared and mailed as above, for execution, they were never back in the office of appellees, or in the hands of any one representing appellees, until after they had been executed, and the trust deed recorded.

The trust deed recites: "The grantors herein reserve the



privilege of paying any of the notes above described, on any interest day, upon giving to the trustee, sixty days previous notice in writing, and paying a premium of 2% of the amount of the principal thereof." It is admitted by the appellants that the alleged alteration of the trust deed by the incorporation therein of the above quoted words, was not made after the recording of said trust deed.

William C. Hubbell testified he prepared the notes and that the red stamp upon the fact of each note was placed thereon when the notes were prepared and before they were mailed for execution. Elsie Huss, an employee of the attorney of appellee bank, testified she prepared the trust deed and that it was in the same condition at the time of the hearing as it was at the time she prepared it, except for the signatures and the filing mark. Florence Klepper, an employee of appellee, states she saw the trust deed and notes before they were executed, that she checked them before they left the bank, and after they were executed and returned. She states that the red stamp was upon the notes before they left the bank, and that she mailed them directly to Mrs. De Vault in Chicago, for execution, and that they are in the same condition now as they were at the time she mailed them, except for the signatures. She states that the above clause was in the trust deed.

The above wording as it appears in the trust deed, undoubtedly was written with the same typewriter that was used to prepare the instrument. Every indication points to this fact. Each member of this court examined the red stamp as placed upon the several notes, with reference to the signature of Mary C. DeVault, which extends into and through the wording of said stamp, in many places. This examination was made with an excellent magnifying glass, free from distortion, and from such examination this court was of the unanimous opinion that the signature of Mary C. DeVault is superimposed upon the red stamp, and not the red stamp superimposed upon her signature. The trial court also used a glass in

privilege of paying any of the notes above described, on any interest day, upon giving to the trustee, sixty days previous notice in writing, and paying a premium of 2% of the amount of the principal thereof." It is admitted by the appellants that the alleged alteration of the trust deed by the incorporation therein of the above quoted words, was not made after the execution of said trust deed.

William C. Hubbell testified he prepared the notes and that the red stamp upon the back of each note was placed thereon when the notes were prepared and before they were mailed for execution. Elsie Hues, an employee of the attorney of appellee bank, testified she prepared the trust deed and that it was in the same condition at the time of the hearing as it was at the time she prepared it, except for the signatures and the filing mark. Florence Kiepper, an employee of appellee, states she saw the trust deed and notes before they were executed, that the notes were before they left the bank, and after they were executed and returned. She states that the red stamp was upon the notes before they left the bank, and that she mailed them directly to Mrs. DeVault in Chicago, for execution, and that they are in the same condition now as they were at the time she mailed them, except for the signatures. She states that the above clause was in the trust deed.

The above wording as it appears in the trust deed, undoubtedly was written with the same typewriter that was used to prepare the instrument. Every indication points to this fact. Each member of this court examined the red stamp as placed upon the several notes, with reference to the signature of Mary C. DeVault, which extends into and through the wording of said stamp, in many places. This condition of the stamp with its wording in places, free from distortion, and from such examination this court was of the unanimous opinion that the signature of Mary C. DeVault is superimposed upon the red stamp, and not the red stamp superimposed upon her signature. The trial court also used a glass in

his examination of these notes.

We find herein as a matter of fact, that the trust deed and notes involved in this case were not altered after their execution, as claimed by appellants herein.

The judgment and decree of the circuit court of Lake county is affirmed.

Decree affirmed.



his examination of these notes.

We find herein as a matter of fact, that the trust deed and notes involved in this case were not altered after their

execution, as claimed by appellants herein.

The judgment and decree of the circuit court of this county is affirmed.

WATSON, J.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

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*Clerk of the Appellate Court*





85-11  
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of February, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

274 I.A. 633<sup>2</sup>

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BE IT REMEMBERED, that afterwards, to-wit: On

APR 25 1934 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

FEBRUARY TERM, A.D. 1934.

Jacob Draves,

Appellee,

vs.

Appeal from the Circuit  
Court, Knox County.

Galesburg Horse and Mule Co.,  
a corporation of Galesburg,  
Illinois, et al,  
Appellants.

HUFFMAN-J.

This was a suit by appellee against appellant based upon the common counts, including the count for money had and received. Trial by jury was had in the Circuit Court of Knox County. The jury returned a verdict in favor of appellee for the amount claimed, and judgment was entered thereon. Appellant prosecutes this appeal from the judgment of that court.

Appellee lives in Ontario, New York. Appellant corporation is engaged in the horse and mule business at Galesburg, Illinois. Appellee used Charles Mills as his buyer and field man in the purchase and sale of horses. The said Mills lives in Coldwater, New York. He states that he had no interest in the horses and that appellee furnished the money with which to buy same. Appellee and Mills were both acquainted with the managing officers of appellant corporation. Mills had done business upon his own accord with the appellant for seven years. He had also done business for appellant on behalf of Mr. Roach who is the president thereof. Mills was personally indebted to appellant in the sum of about \$4000.

In April 1932, appellee and Mills came to Galesburg for the purpose of buying horses. Appellee had a draft payable to his order for \$1000 issued by his bank in Ontario, New York. He and Mills crossed over into Iowa and purchased two horses near the city



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DIVISION  
JANUARY TERM, A.D. 1934.

Local Office,

Appellee,

Appeal from the Circuit  
Court, Knox County,

vs.

Galesburg Horse and Mule Co.,  
a corporation of Galesburg,  
Illinois, et al,  
Appellants.

HURDMAN-7.

This was a suit by appellee against appellant based upon the common counts, including the count for money had and received. Trial by jury was had in the Circuit Court of Knox County. The jury returned a verdict in favor of appellee for the amount claimed, and judgment was entered thereon. Appellant prosecutes this appeal from the judgment of that court.

Appellee lives in Ontario, New York. Appellant corporation is engaged in the horse and mule business at Galesburg, Illinois. Appellee used Charles Mills as his buyer and field man in the purchase and sale of horses. The said Mills lives in Colchester, New York. He states that he had no interest in the horses and that appellee furnished the money with which to buy same. Appellee and Mills were both acquainted with the managing officers of appellant corporation. Mills had some business upon his own accord with the appellant for seven years. He had also done business for appellant on behalf of Mr. Rosch who is the president thereof. Mills was personally indebted to appellant in the sum of about \$4000.

In April 1932, appellee and Mills came to Galesburg for the purpose of buying horses. Appellee had a draft payable to his order for \$1000 issued by his bank in Ontario, New York. He and Mills crossed over into Iowa and purchased two horses near the city

of Fairfield. The banks in that town were closed and appellee could not get his draft cashed. A sight draft was drawn by these parties upon appellant company for the sum of \$280 to pay for these horses. The horses were then transported to appellant's barns by one of its trucks, together with five other horses that had been purchased by one Milton Preston.

J. L. Roach was president, F. L. Meeker vice-president and R.B. Sharp secretary and treasurer, of appellant company. These men were in the active management of the business. The next day after the horses had been purchased in Iowa, the parties returned to Galesburg where they talked with Mr. Sharp and Mr. Meeker regarding the transaction of the previous day. Appellee at this time owed a balance on account to appellant of \$379, upon which Mr. Sharp had entered a credit of \$65, reducing the balance to \$314. Mills had sold a team of horses for appellee for \$225 and gave appellant a check for this amount to apply upon appellee's account. This reduced appellee's balance to \$89.

Appellee wanted to return home, and claims that he left Mills at Galesburg in possession of the \$1000 draft for the purpose of buying more horses to ship east. Appellee claims he had an understanding with Mr. Sharp and Mr. Meeker, of appellant company, that he would leave the \$1000 draft with Mills for the purpose of purchasing more horses, and to pay the balance of \$89 which he owed appellant. He claims that Sharp gave him his pen to indorse the draft to leave with Mills for the purchase of the horses and the payment of the balance of his account. Milton Preston lives in Wheaton, New York, and he had the five horses at appellant's barn, which he had purchased. He was going home because of his father's death, and appellee was returning with him. Appellee left the draft with Mills, and Mills left the draft with the officers of appellant company. Appellant company deposited the draft to its credit and credited the personal account of Mills therefor.

of Fairfield. The banks in that town were closed and appellee could not get his draft cashed. A night draft was drawn by the parties upon appellant company for the sum of \$200 to pay for these horses. The horses were then transported to appellant's farm by one of its trucks, together with five other horses that had been purchased by one Milton Weston.

J. L. Roach was president, T. L. Mosher vice-president and A. L. Mosher secretary and treasurer, of appellant company. These men were in the active management of the business. The next day after the horses had been purchased in Iowa, the parties returned to Galzburg where they talked with Mr. Sharp and Mr. Mosher regarding the transaction of the previous day. Appellee at this time owed a balance on account to appellant of \$375, upon which Mr. Sharp had entered a credit of \$63, reducing the balance to \$312. Mills had sold a team of horses for appellee for \$233 and gave appellee a check for this amount to apply upon appellee's account. This reduced appellee's balance to \$82.

Appellee went to Galzburg, and called on Mr. Sharp at Galzburg in possession of the \$1000 draft for the purpose of buying more horses in that town. Appellee called on Mr. Sharp standing with Mr. Sharp and Mr. Mosher, of appellant company, that he would leave the \$1000 draft with Mills for the purpose of obtaining more horses, and to pay the balance of \$82 which he owed appellee. He claims that Sharp gave him his pen to indorse the draft to leave with Mills for the purchase of the horses and the payment of the balance of his account. Milton Weston lives in Weston, New York, and he had the five horses at appellee's farm, which he had purchased. He was going home because of his father's death, and appellee was returning with him. Appellee left the draft with Mills, and Mills left the draft with the officers of appellee company. Appellant company deposited the draft to its credit and credited the payment account of Milton Weston.



Whereupon appellee instituted this suit as aforesaid for the recovery of the proceeds from the said draft less the balance of \$89 owed by him to appellant.

The evidence of Mills, the appellee, and Preston is to the effect that appellant's officers knew and understood the draft was the property of appellee and that he left it with Mills for the purpose of buying horses for him, to be shipped out with those already purchased by himself and Preston, and which were then at appellant's barns. The officers of appellant company admit conversations were had at these times claimed by appellee, but deny knowledge that appellee left the draft for the purpose claimed. This was a question of fact to be determined by the jury. Where the evidence is conflicting, and that of appellee when considered alone fairly authorizes the verdict, the same will not be disturbed. It is the province of the jury to weigh and consider the evidence, determine the credibility of the witnesses and the weight to be given their testimony; and unless the verdict is contrary to the weight of the evidence a court of review will not substitute its judgment for that of the jury and reverse a case merely because the evidence is conflicting. Appellant's objection that the verdict is against the weight of the evidence is not well taken.

Appellant claims of appellee's given instructions five, six and seven. We have examined these instructions and we do not consider the objection as made thereto constitutes reversible error. The question in this case is whether the appellant had knowledge of appellee's title and ownership to the draft and the purpose for which it had been left by him with Mills, as claimed, at the time they received the same from Mills. From an examination of the record we are of the opinion that the jury was fairly and properly instructed as to the law, and that their verdict is not the result of passion or prejudice and can not be said to be contrary to the manifest weight of the evidence.

The judgment of the Circuit Court of Knox County is affirmed.

Judgment Affirmed .

Whereupon appellee instituted this writ as aforesaid for the recovery of the proceeds from the said draft less the balance of \$82 owed by him to appellant.

The evidence of Mills, the appellee, and Preston is to the effect that appellant's officers knew and understood the draft was the property of appellee and that he left it with Mills for the purpose of buying horses for him, to be shipped out with those already purchased by himself and Preston, and which were then at appellant's farms. The officers of appellant company admit conversations were had at those times claimed by appellee, but deny knowledge that appellee left the draft for the purpose claimed. This was a question of fact to be determined by the jury. Where the evidence is conflicting, and that of appellee when considered alone fairly authorizes the verdict, the same will not be disturbed. It is the province of the jury to weigh and consider the evidence, determine the credibility of the witnesses and the weight to be given their testimony; and unless the verdict is contrary to the weight of the evidence a court of review will not substitute its judgment for that of the jury and reverse a case merely because the evidence is conflicting. Appellant's objection that the verdict is against the weight of the evidence is not well taken.

Appellant claims of appellee's given instructions five, six and seven. We have examined these instructions and we do not consider the objection as made thereto constitutes reversible error. The question in this case is whether the appellant had knowledge of appellee's title and ownership in the draft and the purpose for which it had been left by him with Mills, as claimed, at the time they received the same from Mills. From an examination of the record we are of the opinion that the jury was fairly and properly instructed as to the law, and that their verdict is not the result of passion or prejudice and can not be said to be contrary to the weight of the evidence.

The judgment of the Circuit Court of Knox County is affirmed.

Judgment Affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and

for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*





1976  
86 1  
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of February, in  
the year of our Lord one thousand nine hundred and thirty-four,  
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

274 I.A. 673<sup>3</sup>

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BE IT REMEMBERED, that afterwards, to-wit: On  
APR 25 1934 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:





In the Appellate Court of Illinois

Second District

February Term, A. D. 1934

H. F. Gehant Banking Company,

Appellee,

vs.

Appeal from the Circuit Court  
of Lee County

M. Bradshaw and Mae Bradshaw,

Appellants,

HUFFMAN-J.

Judgment by confession was taken by appellee against appellants on October 10, 1932, in open court, in the circuit court of Lee County, for the sum of \$9241.80. Execution issued, and on October 12, 1932, service of execution was had upon each of appellants. Approximately one year later, and to-wit: On October 16, 1933, appellants filed their motion to set aside the above judgment, alleging lack of jurisdiction upon the part of the court to enter same. This is the only question in this appeal.

The warrant of attorney contained in said note is as follows:

"The undersigned hereby, jointly and severally, empower any attorney of any court of record to appear for them, or either or any of them, in such court in term time or vacation, at any time hereafter and confess a judgment without process against them, or either or any of them, in favor of the legal holder thereof for such sum as may appear to be unpaid thereon with interest, costs and ten per cent attorney's fees, with minimum attorney fee of \$25.00 and to waive and release all errors which may intervene in such proceeding and consent to immediate execution."

The cognovit contained the following language, to which appellants object:

"The defendants further agree that no writ of error or appeal shall be prosecuted on the judgment entered by virtue hereof, nor any bill in equity filed to interfere in any manner with the operation of judgment."

Appellants insist that the warrant of attorney included in the note, not containing the phrase just above set out, which was incorporated in the cognovit, the court was therefore without

In the Appellate Court of Illinois

Second District

Western Term, A. D. 1933

H. T. Gehant Banking Company,

Appellee,

Appeal from the Circuit Court

vs.

of Lee County

M. Bradshaw and Mae Bradshaw,

Appellants,

WITNESSES.

Judgment by confession was taken by appellee against appellants

on October 10, 1932, in open court, in the circuit court of Lee

County, for the sum of \$3241.80. Execution issued, and on October

12, 1932, service of execution was had upon each of appellants.

Approximately one year later, and to-wit: On October 16, 1933,

appellants filed their motion to set aside the above judgment, alleging

the lack of jurisdiction upon the part of the court to enter same.

This is the only question in this appeal.

The warrant of attorney contained in said note is as follows:

"The undersigned hereby, jointly and severally, empower any attorney of any court of record to appear for them, or either or any of them, in such court in term time or vacation, at any time hereafter and to confess a judgment without process against them, or either or any of them, in favor of the legal holder thereof for such sum as may appear to be unpaid thereon with interest, costs and ten per cent attorney's fees, with minimum attorney fee of \$25.00 and to waive and release all errors which may intervene in such proceeding and consent to immediate execution."

The cognovit contained the following language, to which appellants object:

"The defendants further agree that no writ of error or appeal shall be prosecuted on the judgment entered by virtue hereof, nor any bill in equity filed to interfere in any manner with the operation of judgment."

Appellants insist that the warrant of attorney included in

the note, not containing the phrase just above set out, which was

inserted in the cognovit, the court was therefore without

jurisdiction to enter the judgment. They presented their motion to set aside the judgment herein as aforesaid, which motion was based solely upon an alleged lack of jurisdiction upon the part of the court to enter same. The question of any defense to the note is in no way involved in this proceeding,

We understand the rule to be that the filing of a declaration, note and warrant of attorney, affidavit of its execution, and cognovit, brings the defendant before the court, and is enough to confer jurisdiction upon the court to enter judgment. *Bush v. Hanson*, 70 Ill. 480. The court in that case on page 482 of its opinion states: "It appears, from the judgment order, that a declaration, the warrant of attorney, and affidavit of its execution, the note and cognovit by the attorney authorized, were filed. The defendant in the judgment was before the court by appearance by his duly authorized attorney. A case of jurisdiction was then presented." It thus appears that where a note containing a warrant of attorney is filed with affidavit of its execution, together with a declaration and a cognovit, the court acquires jurisdiction to enter up a judgment. In further reference to this matter it will be found that the Supreme Court in the case of *Fields v. Brown*, 188 Ill. 111, on page 113 of its opinion uses the following language: "The power to confess a judgment being clearly given in the writing signed and sealed by the appellant, the circuit court was fully justified in accepting it as sufficient to authorize the entry of appearance and confession of a judgment. The filing of the declaration, lease and warrant of attorney, and affidavit of its execution, and cognovit, presented a case of jurisdiction."

While it is the settled doctrine that the authority to confess a judgment without process must be clear and explicit and strictly pursued, yet this rule has its reasonable limitations, and must not be applied with such strictness as to defeat the obvious intentions of the party granting the power. *Holmes v. Parker*, 125 Ill. 478, 481; *Sharp v. Barr*, 234 Ill. App. 214, 217.



jurisdiction to enter the judgment. They presented their motion to set aside the judgment herein as erroneous, which motion was based solely upon an alleged lack of jurisdiction upon the part of the court to enter same. The question of any defense to the note is in no way involved in this proceeding.

We understand the rule to be that the filing of a declaration, note and warrant of execution, affidavit of the execution, and cognovit brings the defendant before the court, and is enough to confer jurisdiction upon the court to enter judgment. *Boah v. Hanson*, 70 Ill. 430. The court in that case on page 432 of its opinion states: "It appears from the judgment order, that a declaration, the warrant of attorney and affidavit of its execution, the note and cognovit by the attorney authorized, were filed. The defendant in the judgment was before the court by appearance by his duly authorized attorney. A case of jurisdiction was then presented." It thus appears that where a note containing a warrant of attorney is filed with affidavit of its execution, together with a declaration and a cognovit, the court acquires jurisdiction to enter up a judgment. In further reference to this matter it will be found that the Supreme Court in the case of *Field v. Brown*, 183 Ill. 111, on page 118 of its opinion uses the following language: "The court so ordered a judgment being already given in the writing signed and sealed by the appellant, the circuit court was fully justified in accepting it as sufficient to authorize the entry of appearance and confession of a judgment. The filing of the declaration, lease and warrant of attorney, and affidavit of its execution, presented a case of jurisdiction."

While it is the settled doctrine that the authority to confess a judgment without process must be clear and explicit and strictly pursued, yet this rule has its reasonable limitations, and must not be applied with such strictness as to defeat the obvious intentions of the party seeking the judgment. *Kelley v. Kelley*, 120 Ill. 425, 426; *East v. East*, 124 Ill. App. 114, 115.

There is no pretense made here that the judgment was not confessed for the exact amount honestly due to appellee from appellants. The warrant of attorney clearly contained the power to confess judgment against appellants at any time, in favor of the legal holder of the note, for such sum as was due thereon, and with a provision to waive and release all errors which may have intervened in such proceeding and the consent to immediate execution.

With respect to appellants' contention that the court was without jurisdiction to enter this judgment, because of the incorporation of the above phrase in the cognovit, which was not expressly set out in the warrant of attorney, we are of the opinion that the following cases are decisive of this question. Hansen et al v. Schlesinger, et al, 125 Ill. 230; Long v. Goffman, 230 Ill. App. 527. In the Hansen case, the court on page 237 of its opinion states: "In respect to the other branch of the motion, unless some equitable ground was shown, the judgment could not be set aside and the execution quashed. (Citing cases). None has been shown in this case. There is no pretense the judgment was not confessed for the exact amount honestly due to plaintiff from defendants. If the attorney waived more than he was authorized to do by the warrant of attorney, in respect to defendants' right to an appeal or writ of error it is obvious it did them no harm, for they have now had their day in court, notwithstanding the action of their attorney of which complaint is made." In the Long case, supra, the court on page 531 of its opinion states: "The cognovit expressly released all errors in entering the judgment. The warrant of attorney did not, in terms, authorize the attorney to release errors, and it is contended that the powers conferred by the instrument must be strictly pursued and that any material deviation therefrom has the effect of rendering the judgment void. Counsel has stated the rule of law correctly but its application cannot be made to this case, because every confession of a judgment

There is no pretense made here that the judgment was not confessed for the exact amount honestly due to appellee from appellants. The argument of attorney clearly contained the power to confess judgment against appellants at any time, in favor of the legal holder of the note, for such sum as was due thereon, and with a provision to waive and release all errors which may have intervened in such proceeding and the consent to immediate execution.

With respect to appellants' contention that the court was without jurisdiction to enter this judgment, because of the incorporation of the above phrase in the cognovit, which was not expressly set out in the warrant of attorney, we are of the opinion that the following cases are decisive of this question. Hansen et al v. Schlessinger, et al, 133 Ill. 230; Long v. Coffman, 230 Ill. App. 327. In the Hansen case, the court on page 327 of its opinion states: "In respect to the other branch of the motion, unless some equitable ground was shown, the judgment could not be set aside and the execution quashed. (Citing cases). None has been shown in this case. There is no pretense the judgment was not confessed for the exact amount honestly due to plaintiff from defendants. If the attorney waived more than he was authorized to do by the warrant of attorney, in respect to defendants' right to an appeal or writ of error it is obvious it did them no harm, for they have now had their day in court, notwithstanding the action of their attorney of which complaint is made." In the Long case, again, the court on page 321 of its opinion states: "The cognovit expressly released all errors in entering the judgment. The warrant of attorney did not, in terms, authorize the attorney to release errors, and it is contended that the powers conferred by the instrument must be strictly pursued and that any material deviation therefrom has the effect of rendering the judgment void. Counsel has stated the rule of law correctly but its application cannot be made to this case, because every confession of a judgment



operates as a release of errors. (23 Cyc. 721). Therefore the statement in the cognovit that all errors are released amounts to nothing more than a mere recital of what the law is and the result is the same whether the cognovit contains such a statement or not. Because a judgment by confession operates as a release of errors, the law is made to provide that courts of law shall have equitable powers in determining motions to vacate or open up such judgments and that appeals and writs of error may be prosecuted to review the judgment of the court in granting or denying such motions. In addition to this the plaintiff in error has not been prejudiced by such alleged release of errors and there is no legal or equitable reason assigned why the judgment should be vacated on account of such release." Certiorari in this case was denied by the Supreme Court.

The appellants do not question the correctness of this judgment, or advance any legal or equitable objections to same. They urge there was such a material deviation between the warrant of attorney and the cognovit, as to destroy the court's jurisdiction to enter judgment, and that therefore the same is void. We do not adopt this view of the case.

The judgment of the circuit court herein is affirmed.

Judgment affirmed.

operation as a release of error. (22 U.S.C. 122). Therefore the statement in the majority that all errors are released amounts to nothing more than a mere denial of what the law is and the result is the same whether the majority decides such a release or not. Because a judgment by a majority of the court is a release of error, the law is not to provide that courts in the future should be bound by a certain system to release or not to release judgments and that requests and writs of error are to be presented to review the judgment of the court in granting or denying such motions. In addition to this the plaintiff in error has not been prejudiced by such alleged release of error and there is no legal or equitable reason assigned why the judgment should be vacated on account of such release. Contentious in this case was denied by the Supreme Court.

The Appellants do not question the correctness of this judgment or advance any legal or equitable objections to same. They urge there was such a material deviation between the warrant of attorney and the cognovit, as to destroy the court's jurisdiction to enter judgment, and that therefore the same is void. As do not know this view of the case.

The judgment of the circuit court herein is affirmed.  
Affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*





## AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of February, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

274 I.A. 673<sup>4</sup>

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BE IT REMEMBERED, that afterwards, to-wit: On  
APR 25 1934 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:





IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

October Term, A.D. 1932.

ANTONIA BURCAR,

Appellee,

vs.

ALBERT L. ROBERTS,

Appellant.

appeal from the Circuit

Court of LaSalle County.

PER CURIAM:-

Antonia Burcar, hereinafter referred to as appellee, instituted this proceeding against Albert L. Roberts, hereafter called appellant, in an action based on fraud and deceit, averred to have been practiced by the appellant upon appellee in the sale of a stock of merchandise and fixtures in a grocery store in Streator.

The declaration consists of two original and three amended counts, in all of which it is charged that the appellant deceived and defrauded appellee by misrepresenting to her the quantity and quality of the stock of groceries sold. To the declaration the general issue was pleaded.

It appears that in February 1926 the appellant owned a stock of groceries in the City of Streator; that he purchased the stock in October 1925, and that his sister Mrs. O'Neil and his wife managed the store from October until the following February. Appellee lived in Kaneley, near Streator, with her sons and daughters; one of her daughters who attended the Streator High School near the store learned the stock was for sale and on Sunday, February 14th, 1926, Ralph Burcar, twenty-two years of age, and his brother Peter, twenty-six years of age, sons of appellee, called at the home of appellant and went with him to the store and examined the

IN THE  
APPELLATE COURT OF ILLINOIS  
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Appellant.

MR. CURIAN:-

Antonia Burcar, hereinafter referred to as appellee,

instituted this proceeding against Albert L. Roberts, hereinafter called appellant, in an action based on fraud and deceit, averring to have been practiced by the appellant upon appellee in the sale of a stock of merchandise and fixtures in a grocery store in Streator. The declaration consists of two original and three amended counts in all of which it is charged that the appellant deceived and defrauded appellee by misrepresenting to her the quantity and quality of the stock of groceries sold. To the declaration the general issue was

pleaded.

It appears that in February 1928 the appellant owned a stock of groceries in the City of Streator; that he purchased the stock in October 1925, and that his sister Mrs. O'Neill and his wife managed the store from October until the following February. Appellee lived in Kandley, near Streator, with her sons and daughters; one of her daughters who attended the Streator High School near the store learned the stock was for sale and on Sunday, February 14th, 1928, Ralph Burcar, twenty-two years of age, and his brother Peter, twenty-six years of age, sons of appellee, called at the home of appellant and went with him to the store and examined the

stock. According to the theory of appellant the stock was fresh and clean and apparently appellee was pleased with the report made to her by her sons for on the following morning she went to the store and remained examining the stock and observing the trade.

The record further discloses that appellee testified that she resolved on Monday morning to buy the stock. Appellant inquired whether she wanted to buy for a lump sum or on an inventory basis. It appears that an inventory had lately been taken. Appellee said she would not buy for a lump sum nor accept an inventory unless it was made in her presence. She returned on Tuesday with her son Ralph and again examined the stock and watched the trade.

It further appears that she and her said son Ralph returned on Wednesday morning following and arranged with Mrs. O'Neil to have an inventory of the stock taken by a disinterested outsider, and by agreement George Page, a salesman for a wholesale grocery house, was called and an inventory was made by him and under his direction. Appellee and her son Ralph were present throughout the entire taking of the inventory and Ralph assisted Page in taking it. The inventory was largely in the handwriting of Ralph Burcar and was in the possession of appellee from the time the inventory was taken until the trial. The inventory of the value of the stock was in the neighborhood of \$900 and the shelves and fixtures around \$300. Appellee paid appellant the total inventory value of the stock and fixtures on Thursday, February 18th, and immediately went into possession of the stock and the store.

The evidence discloses on the part of appellee as well as appellant, except for a few minor exceptions, as to which there is a conflict in the testimony, that appellee received all the items of goods and property listed in the inventory.

It is the contention of appellee that the groceries were not clean and fresh at the time of the sale. Her son Ralph testified that the store was clean and neat; that the stock was clean and



stock. According to the theory of appellant the stock was fresh and clean and apparently appellee was pleased with the report made to her by her son on the following morning and went to the store and remained examining the stock and observing the same.

The next business day, Monday, January 14th, 1900, appellant in- and resolved on Monday morning to buy the stock. Appellant in- quired whether she wanted to buy for a lump sum or on an inventory basis. It appears that an inventory had lately been taken. Appellee said she would not buy for a lump sum nor accept an inventory unless it was made in her presence. She returned on Tuesday with her son Ralph and again examined the stock and watched the trade.

It further appears that she and her son Ralph returned on Wednesday morning following and arranged with Mrs. O'Neill to have an inventory of the stock taken by a disinterested outsider, and by agreement George Page, a salesman for a wholesale grocery house, was called and an inventory was made by him and under his direction. Appellee and her son Ralph were present throughout the entire taking of the inventory and Ralph assisted Page in taking it. The inventory was largely in the handwriting of Ralph Emerson and was in the possession of appellee from the time the inventory was taken until the trial. The inventory of the value of the stock was in the neighborhood of \$900 and the shelves and fixtures around \$300. Appellee paid appellant the total inventory value of the stock and fixtures on Thursday, February 16th, and immediately went into possession of the stock and the store.

The evidence discloses on the part of appellee as well as appellant, strong for a few minor items, as to what there is a conflict in the testimony, that appellee received all the items of goods and property listed in the inventory.

It is the contention of appellee that the groceries were not clean and fresh at the time of the sale. Her son Ralph testified that the store was clean and neat; that the stock was clean and

that the cans were clean and not rusty; and that the whole place looked attractive. There is evidence in the record, however, to the effect by appellee and her son Ralph that some time after the sale was made some of the goods were found to be spoiled. The evidence of the son Ralph is that the total value of all goods claimed to have been spoiled, including goods claimed to have been found spoiled something like eight months after the sale was \$315.90. The judgment was for \$848.00.

It is the contention of appellant that the judgment of the Circuit Court should be reversed and the cause remanded because the evidence shows that appellee received the goods described in the inventory and that the stock at that time was clean and fresh and the cans free of dust; that the evidence does not prove fraud on the part of appellant as alleged in the declaration; that the Court admitted improper evidence which tended to confuse the jury; that the Court erred in its instructions to the jury and that the damages, even if plaintiff was entitled to recover, are excessive.

On an examination of the declaration it will be found that appellee avers that appellant deceived and defrauded her in the two following particulars; first, as to the quantity of stock of groceries in the store; that it was less than shown by the inventory; Second, as to the quality of the stock of groceries in the store; that an indefinite part of it was spoiled and unmerchantable.

The evidence discloses that the entire stock of groceries was inventoried by or under the supervision of an experienced and disinterested wholesale grocery salesman; that the inventory was made in the presence of appellee and her son Ralph, a young business man; that the greater part of the inventory was in the handwriting of the son of appellee, who assisted through out in the taking of it, and it appears from the evidence of Ralph himself that there was no material shortage but the items on the inventory were substantially correct in so far as he could remember.

that the cans were clean and not rusty; and that the whole place looked attractive. There is evidence in the record, however, to the effect by appellee and her son Ralph that some time after the sale was made some of the goods were found to be spoiled. The evidence of the son Ralph is that the total value of all goods claimed to have been spoiled, including goods claimed to have been found spoiled something like eight months after the sale was \$215.90. The judgment was for \$248.00.

It is the contention of appellant that the judgment of the Circuit Court should be reversed and the cause remanded because the evidence shows that the inventory was made as described in the inventory and that the stock at that time was clean and fresh and the cans free of dust; that the evidence does not prove fraud on the part of appellant as alleged in the declaration; that the Court admitted improper evidence which tended to confuse the jury; that the Court erred in its instructions to the jury and that the damages, even if plaintiff was entitled to recover, are excessive.

On an examination of the declaration it will be found that appellee avers that appellant deceived and defrauded her in the two following particulars; first, as to the quantity of stock of groceries in the store; that it was less than shown by the inventory; second, as to the quality of the stock of groceries in the store; that an indefinite part of it was spoiled and unmerchantable.

The evidence likewise shows that the entire stock of groceries was inventoried by or under the supervision of an experienced and disinterested witness, a young business man; that the inventory was made in the presence of appellee and her son Ralph, a young business man; that a greater part of the inventory was in the handwriting of the son of appellee, who assisted through out in the taking of it, and it appears from the evidence of Ralph himself that there was no material mistake or error in the inventory but the items on the inventory were substantially correct in so far as he could remember.



The evidence offered by appellee on the question of the quality of the goods and bearing upon the charge of fraud and deceit is meagre. The evidence on the part of appellee on this part of the case was given by herself and her two sons, Ralph and Peter. They failed to testify that the stock of goods was spoiled in whole or in part at the time of the sale. Appellee testified that she went to the store every other day after she bought it and that she found nothing wrong with any of the stock until four or five days after the purchase. The son Ralph testified that he knew of some items of the goods which he claimed were spoiled two days after the sale and about all of them not later than five days after the sale. The record fails to disclose, however, that if he did observe anything with reference to there being any spoiled goods he did not disclose that fact to his mother, the appellee.

It is also urged by appellant that the Court admitted in evidence over his objection, a certain Exhibit. Apparently the Exhibit was an inventory of the stock made some time prior to the sale. It does not appear when the inventory was made, or by whom. It is quite apparent that it had no bearing on the case. The record discloses that appellee testified that she refused to accept any other inventory than her own or to deal on the basis of any other. An inventory made at some time prior would not show the same goods that would be shown in an inventory made at the time of the purchase by appellee and to introduce a former inventory, especially without proof as to who made it or when it was made, necessarily tended to mislead the jury and gave it to understand that it should consider any discrepancies which might appear in the two inventories in making up its verdict. We think the court erred in admitting the Exhibit.

It is contended also by the appellant that the Court erred in giving instruction number Three. In instruction number Three, instead of informing the jury that the measure of damages was

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It is contended also by the appellant that the Court erred in giving instructions number three, in instruction number four, instead of informing the jury that the measure of damages was

the difference between the value of the goods as they were and as they were represented, the instruction informed them that they "May allow to the plaintiff such fair and reasonable sum as will fairly and reasonably reimburse the plaintiff for any actual losses \*\*\* she may have unavoidably sustained as a direct result of the alleged false and fraudulent statements and representations made by the defendant to the plaintiff."

The record discloses that Ralph Burcar, son of appellee, was the only witness who testified on the subject that the total value of all the goods which were of inferior quality or spoiled was \$315.90. That figure would represent the difference between the value of the goods as they were and as they were represented to be if appellant had been guilty of fraud and deceit as averred. The verdict was for \$775.00, but it appears that quite a considerable length of time elapsed before judgment was rendered on the verdict and judgment was subsequently rendered for the sum of \$848.00. If appellee was entitled to recover the measure of her damages would be the difference between the value of the stock as it was and what it would be worth if the alleged false representations concerning it had been true. The measure of damages in an action for fraud and deceit is the difference in the worth of the property as represented and its real value. Or as it is sometimes stated, it is the difference between the value of the property as it is and what it would be worth if the representations had been true. Schwitters vs. Springer, 236 Ill. 271; Siltz vs. Springer, 236 Ill. 276; Stewart vs. Clark, 194 Ill. App. 2.

We are of the opinion that reversible error was committed in the trial of this cause and the judgment of the Circuit Court of LaSalle County is reversed and the cause remanded.

REVERSED AND REMANDED.



the difference between the value of the goods as they were and as they were represented, the instruction informed them that they "may allow to the plaintiff such fair and reasonable sum as will

fairly and reasonably reimburse the plaintiff for any actual losses \*\*\* she may have unavoidably sustained as a direct result of the alleged false and fraudulent statements and representations made by the defendant to the plaintiff."

The record discloses that Ralph Barker, son of appellee, was the only witness who testified on the subject that the total value of all the goods which were of interior quality or spoiled was \$375.00. That figure would represent the difference between the value of the goods as they were and as they were represented to be if appellee had been guilty of fraud and deceit as averred.

The verdict was for \$775.00, but it appears that quite a considerable length of time elapsed before judgment was rendered on the verdict and judgment was subsequently rendered for the sum of \$848.00. If appellee was entitled to recover the measure of her damages would be the difference between the value of the stock as it was and what it would be worth if the alleged false representations concerning it had been true. The measure of damages in an action for fraud and deceit is the difference in the worth of the property as represented and its real value. Or as it is sometimes stated, it is the difference between the value of the property as it is and what it would be worth if the representations had been true.

111. 876; Stewart vs. Clark, 104 Ill. App. 8.

We are of the opinion that reversible error was committed in the trial of this cause and the judgment of the Circuit Court of Madison County is reversed and the case remanded.

REVEREND JUDGE

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

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*Clerk of the Appellate Court*





Lula A. Black, Appellee, v. William T. Barton, Mabel  
McCoy, Mabel Walker, Inez N. Blith, John R.  
McCoy, and R. L. Webber, Administrator  
with the will annexed of the estate  
of Mary A. Barton, deceased,  
Appellants.

274 I.A. 673

*Appeal from the Circuit Court of Brown County,  
Illinois.*

JANUARY TERM, A. D. 1934.

Gen. No. 8791

Agenda No. 3

MR. JUSTICE DAVIS delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of Brown County, rendered on the hearing of a bill filed by appellee to construe the last will and testament of her mother, Mary A. Barton, deceased.

Mary A. Barton died testate in the city of Mt. Sterling, Illinois, on December 15, 1930, and the provisions of her last will and testament which was admitted to probate and record in the county court of Brown County, Illinois, are as follows:

FIRST: It is my will that my funeral expenses and all my just debts be fully paid.

SECOND: I give and devise to my son, William T. Barton, the east half of the south east quarter of Sec. No. 15 in Tp. one south range three (3) West of the 4" P. M. in Brown County State of Illinois for and during his natural life and at his death I give & devise said lands to my two daughters viz Lula A. Black and Mabel McCoy share and share alike to them and their heirs forever.

3Rd. I give and devise to my daughter Mabel McCoy the east 80 acres of the south west quarter of sec. 23, in Tp. one south range three west of the 4" P. M. in the County of Brown and State of Illinois during her natural life and at her death I give and devise said land to her two children John R. McCoy and Inis May Blith to them share and share alike and to their heirs forever.

4" I give and devise to my daughter Lula A. Black the east half of the south west quarter of sec. 6 and the north west quarter of the south east quarter of said Sec. 6 in Tp. one south range four west of the 4" P. M. in Brown County State of Illinois during her natural life and at her death I give and devise said land to her daughter Mabel Walker and her heirs forever.



5 I give the rents from the west half of the north east quarter of Sec. 14 Tp. one south range four west of the 4' P. M. in Brown County State of Illinois to my said three children William T. Barton Lula A. Black and Mabel McCoy they to share equally in same & they to rent said land until such a time as they can sell same for a fair price when they are to sell same and make a proper deed for same and divide the consideration for same equally among them.

6th My home, Lot No. three (3) in Block No. Three (3) in A. Curry and R. H. Hurlbuts Add. to the town (now city) of Mt. Sterling Illinois I direct my executors hereinafter named to sell said lot and I authorize them to make and execute a proper deed for same & I also authorize my said executors to sell and execute any and all necessary papers to pass title to such property sold that may be necessary to properly settle my estate. No order of court is to be required and after the payment and satisfying clause one herein my said three children are to have the remainder of the proceeds from said lot and any personal property I may own they to share equally therein any note or notes I may hold against either of my said children is to be considered an advancement against *Shuch* child and is to be deducted from such child's share in my estate.

I have made this will as I want it and as I consider just and fair taking into consideration the various things that have preceded this will and should either of my said children attempt to prevent the execution of this will or try to break it such child is to forfeit what is herein given him or her & he or she is to have no part there in & such non offending child or children are to have the estate same to be received as herein given only the part received is to be enlarged and such offending child is not to act as executor.

LASTLY, I hereby nominate and appoint my said three children William T. Barton, Lula A. Black and Mabel McCoy to be the executors of this my last will and testament, hereby revoking all former wills by me made.

Mary A. Barton left surviving her Lula A. Black, a daughter and appellee herein, and William T. Barton, a son, Mabel McCoy, a daughter, Mabel Walker and Inis M. Blith, granddaughters, and John R. McCoy, a grandson, as her sole and only heirs at law.

R. L. Webber was duly appointed by the county court of Brown county, Illinois, administrator with the will annexed of the estate of said Mary A. Barton, deceased, and all of said parties with the exception of Lula A. Black, appellee, were made defendants to the bill of complaint filed by appellee.





In her bill of complaint appellee alleges that on or about May 5, 1923, she was indebted to said Mary A. Barton, deceased, in the sum of \$5680.00, which was evidenced by a promissory note for said sum with interest at the rate of 6% per annum from date until paid and was then due and payable, that William S. Black, the husband of appellee, and Hattie H. Black, his sister, were sureties on said note; that on November 1, 1927, all indebtedness of appellee including said promissory note as aforesaid was extinguished and liquidated in the following manner:

William S. Black and Hattie H. Black were at that time the owners of the east half of the southwest quarter of section six and the northwest quarter of the southeast quarter of said section six in township one south, range four west of the fourth principal meridian, in Brown County, State of Illinois, said lands being occupied at the time by appellee and her husband, William S. Black, and said Hattie H. Black; that the fair cash market value of said real estate at that time was twenty thousand dollars, subject to a mortgage securing the sum of seventy-five hundred dollars; that appellee and her husband were at that time indebted to the Timewell State Bank, the Timewell Farmers Cooperative Company and M. E. McCabe in the total sum of \$2832.40; that the said Mary A. Barton on said November 1, 1927, agreed, in consideration of the conveyance to her of the above described real estate, that she would assume the payment of said mortgage, pay the said indebtedness amounting to the sum of \$2832.40 and also release and discharge appellee and said William S. Black and Hattie H. Black from all liability from the indebtedness due and owing from appellee and her husband, William S. Black, and Hattie H. Black to her, including said note above described and would cancel and deliver said note to appellee; that, relying upon said promise of said Mary A. Barton, appellee and her husband, William S. Black, and said Hattie H. Black, on November 1, 1927, executed and acknowledged and delivered a deed to said real estate to said Mary A. Barton, who from that time on has been the owner thereof and that the same has been inventoried as part of her estate.

That the relations between appellee and her mother at that time and continuously until her death were tender, affectionate and amicable, and that appellee relying upon the promise of her mother and believing that she would surrender and cancel said note within a reasonable time did not insist upon the immediate surrender and cancellation of the same, but thereafter, while visiting her mother, requested her to deliver and cancel said note, and her mother who claimed she kept





said note in a purse, which at that time was in the possession of said William T. Barton requested the said Barton to deliver said note to appellee; that he never delivered said note to appellee but that after her mother's death the note was found in the possession of said Barton and that from thence hitherto it has been and still is in his possession; that said Barton paid nothing for said note and that he is not a bona fide holder of said note in due course, nor was the same assigned or transferred to him by said decedent in her life time; that appellee was not indebted to her mother at the time of the execution of her will nor at the time of her death; that the other children of deceased now claim that the notes mentioned in the sixth clause of said will of deceased includes the said note which had been liquidated as aforesaid and is to be considered evidence of an advancement against the interest provided for appellee by the said last will and testament and that under the second paragraph of said sixth clause she will forfeit all her interest in said estate unless she pays said note and interest thereon down to the present time to be deducted from appellee's share in said estate; and that the other children now contend that the refusal of appellee to either pay said note, or permit the supposed indebtedness evidenced by it to be deducted from her interest in said estate subjects her said interest to forfeiture under the sixth paragraph of said will which provides that "should either of my said children attempt to prevent the execution of this will such child shall forfeit what is here given to him or her;" that said other children now insist that it was the intention of decedent to include, at the time of the execution of the will, all notes formerly held or owned by her, whether paid or unpaid; that in view of the circumstances surrounding the testatrix, at the time of the execution of the will, she meant, by use of the words "execution of the will" the probate of the will; that she did not intend that any child's interest in her estate should be charged with the payment of any paid or liquidated notes which might be in her possession at the time of her death; that the said sixth clause of said will is ambiguous and uncertain, and its true meaning and intent should be rendered certain by a construction of this court; appellee prays that the court will construe said will and that she may have such other and further relief in the premises as equity may require, etc.

The defendant, R. L. Webber, administrator with the will annexed, answered the bill and denied that appellee is entitled to the relief or any part thereof, and prays that the bill be dismissed, etc.



Defendants, William T. Barton and Mabel McCoy, answered and deny that the note executed by appellee was ever paid by her in any manner or that the conveyance of the real estate mentioned therein was in payment of said note, but allege that said note never has been paid; that it was always in the possession of the testatrix up to the time of her death and that she never promised appellee in her life time that she would cancel the same; that under the sixth clause of the will the note is evidence of an advancement to appellee and must be deducted from her share of the estate; that appellee is trying to contest the validity of the will under the guise of a construction thereof and that its provisions are clear and unambiguous and need no construction, whereby the court is without jurisdiction of the subject matter.

On account of the fact that the regular master in chancery of said court was disqualified because of being interested in said suit the cause was referred to Vernon Briggs, as Special Master, to take the evidence and report the same together with his findings of fact and conclusions of law.

The master found that on or about May 17, 1923, Lula A. Black was indebted to said Mary A. Barton in the sum of \$5680.00, which was evidenced by a note bearing interest at the rate of 6% per annum and upon which note her husband, William S. Black, and Hattie H. Black were sureties; that said William S. Black and Hattie H. Black were, on November 1, 1927, the owners of the east half of the southwest quarter and the northwest quarter of the southeast quarter of section six in Township one south, range four west of the fourth principal meridian in Brown County, Illinois, and that at that said time the fair cash market value of the same was \$18000.00; that the same was subject to a mortgage in favor of the State Savings, Loan and Trust Company, Quincy, Illinois, securing an indebtedness of Seven Thousand Five Hundred dollars; that on said date appellee and her husband, William S. Black, were indebted to the Timewell State Bank in the sum of \$2090.69, to the Timewell Farmers Co-operative Company in the sum of \$431.78, and to M. E. McCabe in the sum of \$131.19; said last three items of indebtedness having been reduced to judgment in the Circuit Court of Brown County, Illinois.

That on November 1, 1927, said William S. Black and Lula A. Black, his wife, and Hattie H. Black made, executed and delivered to Mary A. Barton a warranty deed for said real estate for the stated consideration of one dollar and other considerations; that at said time Mary A. Barton satisfied the indebtedness of William S. Black, Lula A. Black and Hattie H. Black





above mentioned to the Timewell State Bank, the Timewell Farmers Co-operative Company and to M. E. McCabe. That the note for the sum of \$5680.00, payable to the order of Mary A. Barton, was never delivered to either William S. Black, Lula A. Black or Hattie H. Black, but that said note remained in the unconscious possession of said Mary A. Barton. That from and after the acceptance of said warranty deed to said real estate said Mary A. Barton did not consider her said daughter, Lula A. Black, nor her husband nor said Hattie H. Black indebted to her by reason of and on account of the execution of said \$5680.00 note.

The Master concludes that said note for \$5680.00, executed by Lula A. Black, William S. Black and Hattie H. Black and payable to Mary A. Barton, should not be considered evidence of an advancement against the interest of Lula A. Black in and to the estate of Mary A. Barton, deceased, under the terms of her last will and testament and that the same is not an asset of the estate of Mary A. Barton, deceased.

That the word "hold" in the first paragraph of the sixth clause of the said last will and testament of said Mary A. Barton, deceased, should be construed not to mean mere possession of liquidated obligations but ownership of valid existing and unliquidated obligations, if any. That in the second paragraph of said sixth clause of said last will and testament of Mary A. Barton, deceased, the words "attempt to prevent the execution of this will," should be construed to mean "attempt to prevent the probate of this will," and that the filing of the bill by appellee should not operate as a forfeiture of her interest in the estate of said Mary A. Barton, deceased.

Exceptions to the report of the master were overruled and a decree was entered in said cause.

The court found that the note for \$5680.00, which was owned by appellee to the deceased, Mary A. Barton, was extinguished and liquidated by a conveyance from William S. Black and Hattie H. Black to deceased of the real estate which was described in the bill of complaint and that the fair cash market value of said real estate at the time of the conveyance thereof was \$20,000.00, subject to a mortgage securing an indebtedness of \$7,500.00, and that appellee and her husband were indebted to the Timewell State Bank, the Timewell Farmers Co-Operative Company and M. E. McCabe in the total sum of \$2,832.40, and that on November 1, 1927, deceased agreed, in consideration of the conveyance to her of the said real estate, that she would assume the payment of said mortgage, pay the indebtedness of said bank, Co-operative Company and said M.E.

The first of the year was a very dry one, and the crops were much affected by the drought.

The second of the year was a very wet one, and the crops were much affected by the rain.

The third of the year was a very dry one, and the crops were much affected by the drought.

The fourth of the year was a very wet one, and the crops were much affected by the rain.

The fifth of the year was a very dry one, and the crops were much affected by the drought.

The sixth of the year was a very wet one, and the crops were much affected by the rain.

The seventh of the year was a very dry one, and the crops were much affected by the drought.

The eighth of the year was a very wet one, and the crops were much affected by the rain.

The ninth of the year was a very dry one, and the crops were much affected by the drought.



McCabe, and also release and discharge appellee and her husband, William S. Black, and Hattie H. Black from all liability on said indebtedness then due and owing from appellee and her husband, William S. Black, and Hattie H. Black to said deceased, including the note for \$5,680.00, and that said conveyance was executed upon that consideration.

The court further found that a dispute had arisen between the defendants, Mabel McCoy and William T. Barton, and appellee as to the proper construction to be placed upon the sixth clause of said will; that said William T. Barton and Mabel McCoy claim that, unless the note for \$5,680.00 with accrued interest from its date until the time of the death of the testatrix is paid by appellee, that she will forfeit all right to any devise or legacy under said last will and testament and that it was proper that said clause should be construed and that the said suit is brought in good faith for the purpose of enabling the estate to be properly administered and settled; that said William T. Barton and Mabel McCoy claim that under the following language in said last will and testament, namely: "any note or notes I may hold against either of my said children is to be considered an advancement against such child and is to be deducted from such child's share in my estate", the said note of \$5,680.00 and accrued interest, although paid and extinguished, must be considered an advancement and deducted from appellee's share in said estate, and found that it was not the intention of the testatrix that said amount was to be deducted from the share of appellee.

It was ordered by the court that said indebtedness of appellee in the sum of \$5,680.00, evidenced by said promissory note, has been and the same is declared to be liquidated, cancelled, discharged and paid and is not an asset of said estate and that none of the makers thereof are indebted thereon to said estate; that the language in said will, "any note or notes I may hold against either of my said children is to be considered an advancement against such child and is to be deducted from such child's share in my estate", be, and the same is hereby construed to mean any unpaid notes; that appellee has not attempted to prevent the execution of the last will and testament of deceased or tried to break such will and that appellee has done nothing to forfeit her interest in any devise or legacy under said will.

The defendants, William T. Barton and Mabel McCoy, prayed an appeal to this court and perfected the same by giving bond as required by the order of said court and are the sole appellants in this court.



The principal reason urged for a reversal of said decree is that appellee had a full, adequate and complete remedy at law, and that the language contained in said will had a certain definite legal meaning and was not ambiguous and that there is no latent ambiguity in said will and that the bill should therefore have been dismissed for want of equity.

No trust being involved in this will, jurisdiction to construe the same must then depend upon the Act of June 5, 1911, Cahill's St. Ch. 22 Par. 50, which conferred jurisdiction upon courts of equity to hear and determine bills in equity to construe wills notwithstanding no question of a trust is involved therein.

While such authority is conferred by said amendment, yet it is error for a court of equity to assume jurisdiction to construe a will when there is no doubt or uncertainty as to the rights and interests of the parties arising from ambiguous language in the will. *Bimslager v. Bimslager*, 323 Ill. 303.

Equity will entertain a bill for the construction of a will which, though clear on its face, discloses a latent ambiguity when read in the light of extrinsic facts. *Heckler v. Young*, 264 Ill. App. 34.

A reading of the will discloses that it is very crudely drawn and that it presents sufficient ambiguity in the language used to give the court jurisdiction to construe it.

The evidence which includes the testimony of disinterested witnesses fully sustains the findings of the Master and the Court that the conveyance of the real estate made to testatrix was in liquidation of the indebtedness of appellee. The court will not construe an indebtedness of a devisee or legatee which was paid to the testatrix in her life time to be an advancement to be deducted from such devise or legacy.

The decree of the Circuit Court is affirmed.

*Decree affirmed.*

(Ten pages in original opinion.)





William L. Patton, Appellee, v. Mary Ann Adams,  
Appellants.

*Appeal from Circuit Court of Sangamon County.*

JANUARY TERM, A. D. 1934.

274 I.A. 674<sup>1</sup>

Gen. No. 8818

Agenda No. 12

MR. JUSTICE DAVIS delivered the opinion of the court.

By this appeal appellant is seeking to reverse an order of the Circuit Court of Sangamon County, sustaining an order entered by the Probate Court of said county, in a matter arising in the administration of the estate of Harriet Kerneghen, deceased.

In March, 1932, the law firm of Follansbee, Shorey & Schupp, of Chicago, Illinois, received a letter from Thomas Elliott, a solicitor residing at Newry, Ireland, concerning the estate of Harriet Kerneghen, deceased, in which he stated that he was acting for Mary Ann Adams, of Lisadian, Ireland, and that Thomas Jarrett, of Springfield, Illinois, was the solicitor dealing with the estate, and stating that no money had been paid over to his clients and that they were getting old and are in poor circumstances, and requesting said firm to ascertain the full particulars of the estate and write him concerning the matter.

The firm of Follansbee, Shorey & Schupp wrote a letter to William L. Patton, appellee, referring the matter to him and asking him to investigate. Harriet Kerneghen died testate on May 1, 1928, and letters testamentary were issued to Thomas L. Jarrett on June 28, 1928, upon his giving bond in the penal sum of \$40,000.00. He inventoried personal assets amounting to the sum of \$23,000.00.

By the terms of her will the money was to be divided equally between a number of legatees, one of whom was appellant, Mary Ann Adams. Jarrett filed no report until January 10, 1931. Appellee entered his appearance for appellant in said estate and proceeded to investigate the same and filed objections to said report, alleging that it contained improper charges, excessive claims by the executor for fees and expenses and false credits for alleged payments of legacies which had not in fact been paid. Another report was filed by the executor on August 12, 1932, to which appellee also filed objections. The results of these proceedings was that Jarrett as such executor was forced to make settlement by the Probate Court.





Thomas Jarrett, the executor, procured an order to make partial distribution to appellant in the sum of \$2000.00, which was paid by the executor by a check payable to the order of appellee, who remitted the same to Follansbee, Shorey & Schupp, who advised Elliott of the payment and that they would forward the same to him as soon as his client, the appellant, should sign and return a receipt and agree that they should receive as a fee for their services performed the sum of \$300.00. From the correspondence introduced in evidence, it appears that appellant refused to agree to pay the \$300.00 as a fee and repudiated Elliott's employment as her solicitor. Elliott advised Follansbee, Shorey & Schupp of these facts and they returned the \$2000.00 to appellee, who filed his petition in the Probate Court for leave to deposit the fund with the clerk and for an order fixing appellee's solicitor's fee at \$300.00, and that the clerk be directed to pay the fee out of the fund. The Probate Court entered an order in accordance with the prayer of the petition, and the Circuit upon appeal entered a similar order. Depositions of Elliott, appellant, and other witnesses were taken in Ireland and read in evidence upon the hearing on said petition. It was stipulated on the hearing by counsel for appellant that a fee of \$300.00 was a reasonable fee, and that the amount of the fee was not disputed.

Appellant relies upon two errors for a reversal of the order of the Circuit Court: First, that the Probate Court had no jurisdiction to make the order entered by it, and that for such reason the Circuit Court was without jurisdiction; second, that the evidence failed so show employment of Elliott, and hence appellee was without authority to act on behalf of appellant.

Appellee stated in his petition, filed in the Probate Court, that he brings into court a check for \$2,000.00 and prays that he may be allowed to deposit the same with the clerk of said court and that the clerk be instructed and authorized to procure payment of said check and hold the proceeds subject to the further order of the court, and that the clerk be authorized, ordered and directed to pay petitioner out of said proceeds the sum of \$300.00, in full for services rendered by petitioner on behalf of said Mary Ann Adams.

Appellant moved the court to strike the petition of appellee from the files for the reason that the court had no jurisdiction to hear said petition or adjudicate the same, and for the further reason that the petition shows no employment of appellee. After a similar motion was overruled by the Circuit Court appellant, by leave of court, filed an answer to said petition, in which she says: That appellee was, at no time or in



any manner, expressly or impliedly retained or employed or instructed to act for her in the matters alleged in the petition. The questions, that were presented to the Probate Court for hearing and determination, were as to whether appellee was ever retained by appellant or had authority to represent her and look after her interests in said estate, and, if so, the fixing of a proper allowance for such services.

None of the acts of appellee in representing the interest of appellant in said estate in said Probate Court were repudiated by appellant or called to the attention of the court, and said dispute did not affect or interfere with the proper administration of said estate in any way. Appellant, upon being informed that appellee had obtained the sum of \$2,000.00, which was ordered by the court to be paid to her, did not come into court and charge that appellee was without authority to represent her and that, by virtue of his appearance as her solicitor, he had obtained the \$2,000.00 that was ordered paid to her, and refused to pay the same over unless she consented to pay him the sum of \$300.00 for his services in so representing her, and thus give the court jurisdiction to investigate such charges and determine whether appellee was employed and was authorized to represent appellant.

The Probate Court is concerned in no way with the dispute that has arisen between Mary Ann Adams and appellee, William L. Patton, as to whether he was employed or in any way authorized to guard the interests of appellant in said estate, or if so, as to what would be reasonable compensation for such services as he had performed.

The fact that the court was in control of said fund would not give its jurisdiction to hear and determine the questions in dispute between appellant and appellee. It would have no more jurisdiction to hear and determine the dispute as to the employment of appellee and the fixing of proper solicitor's fees than it would have in any other case where some matter of dispute arose between a legatee and his attorney in the settlement of an estate.

If as a matter of fact appellee was employed by appellant as her solicitor, to guard her interests in said estate, he had a right to collect the \$2,000.00 for his client, retain his reasonable compensation for his services, and remit the balance to his client without the aid of any court.

The Circuit and Probate Courts being without jurisdiction to hear and determine the petition of appellee, the order of the Circuit Court is reversed and the cause remanded to that court with directions to dismiss the petition for want of jurisdiction.

Reversed and remanded with directions.

(Four pages in original opinion)





General Motors Acceptance Corporation, a Corporation,  
Appellant, v. Richard Vaughn and  
Emmet C. Vaughn, Appellees.

*Appeal from Circuit Court, Edgar County.*

OCTOBER TERM, 1933.

Gen. No. 8777

Agenda No. 23

MR. JUSTICE FULTON delivered the opinion of the court.

On June 15, 1931, Appellee, Richard Vaughn, who was then a minor, and Emmett C. Vaughn, purchased a Chevrolet Truck from the Simpson Chevrolet Company. The purchase price was \$948.00. Part payment was made by turning over to the vendor a 1930 Chevrolet Coupe, at a value of \$324.00 and the balance of \$624.00 was to be paid in monthly installments of \$52.00 until paid. Both Appellees signed a conditional sales contract. On the same date Appellant purchased the contract and note. Thereafter the Vaughns made one payment of \$52.00 which was the total amount paid under the contract. Because of the default and failure to make further monthly payments, Appellant instituted this replevin suit on November 3, 1931, to recover possession of the truck. On a trial in the Edgar County Circuit Court an alternative judgment was rendered against Appellant which in substance found Appellee Richard Vaughn entitled to the possession of the property in question and required Appellant to pay Richard Vaughn the sum of \$377.00 and interest within ten days or return the property to said Appellee.

Before the commencement of the replevin suit a representative of Appellant demanded possession of the truck from Richard Vaughn and testifies he was told that "if" and "when" he paid back to the minor what the latter had paid on the car he could have it. While other questions are argued the controlling one was whether or not an adult can sell personal property to a minor on a conditional sales contract, receive part payment, and upon default by the minor and refusal to complete the payments due, take the property in an action of replevin, and compel the minor to start an independent suit for the recovery of payments made.

It is insisted by Appellant that there was no repudiation of the contract by the minor, but the testimony of Appellant's agent that he demanded the truck from Appellee Vaughn and was told he could have it when the payment made by Vaughn was returned to him, is sufficient proof of repudiation.





It is further contended by Appellant that there can be no repudiation without a return of the property and there is no authority in law for an infant to hold the property as security for the return of his payments. It is conceded that upon the repudiation of a contract by a minor because of infancy, the rights of the parties are wholly governed by law, and not by their contract. *Fuller v. Pool*, 258 App. 513. To hold that an infant must consent to the replevin, return the property and then start a new and independent suit for the payments made, places the minor at a great disadvantage and would entail needless delay and expense. We believe the adjustment of rights between parties growing out of the same transaction should be determined in one action if permitted under the law. In an action of replevin by a mortgagor where the mortgagee set up by plea the notes and mortgage, alleging the non-payment of the last of the series of notes, the mortgagor replied that in making a sale of the property to him the mortgagee had made a warranty in respect thereto, of which there had been a breach, and that the damages arising from such breach equaled in amount the unpaid note, it was held that such a defense to the note was admissible. *Hutt v. Bruckman et al*, 55 Ill. 441. In *Hamilton v. Singer Manufacturing Co.* 54 Ill. 370, the court held that a machine delivered to an adult upon which a part payment had been made could not be recovered in replevin without the returning of the payment made by the defendant. To the same effect is *O. & M. Ry. Co. v. Noe*, 77 Ill. 513. It is our judgment that Richard Vaughn being a minor had a legal right to repudiate his contract: that having made payments upon the purchase price of the truck he had a special property in the truck and was rightfully in possession until the \$377.00 was paid to him.

The alternative judgment entered by the Court was proper under the facts in this case and the judgment of the Circuit Court is affirmed.

*Affirmed.*

(Three pages in original opinion.)



**H. F. Zelle, Appellee, v. The Morton State Bank,  
Appellant.**

*Appeal from Circuit Court, Tazewell County.*

JANUARY TERM, A. D. 1934.

274 I.A. 674<sup>3</sup>

Gen. No. 8786

Agenda No. 2

MR. JUSTICE FULTON delivered the opinion of the court.

This was a suit in assumpsit brought by Appellee, H. F. Zelle, against the Morton State Bank, a corporation, Appellant. The declaration consisted of the common counts and attached to the declaration was the verified affidavit of Appellee's claim. The affidavit in substance recites that the demand of Appellee is for money due him upon an agreement to repurchase bonds sold to him by Appellant bank through its agent and cashier, Fred Reuling Jr.; that subsequent to making the purchase of certain bonds the Appellee made demand upon Appellant to repurchase said bonds and to pay him the sum of \$4,125.38, representing the amount paid by Appellee to Appellant for said bonds, together with accrued interest; also that the bonds were tendered back to Appellant at the time the demand for repayment was made.

Appellant filed a plea of general issue supported by an affidavit of meritorious defense, in which a denial was made of the making of the agreement to repurchase. The Appellant also filed an additional plea of the Statute of Frauds reciting that the agreement set forth in Appellee's declaration was not in writing; that it was not to be performed within one year from the time of the making thereof and was therefore void. Both at the close of the plaintiffs evidence and at the close of all the testimony, Appellant moved the Court to instruct the jury to return a verdict for the defendant and submitted an instruction for that purpose. In each instance the motion was denied and the instruction refused. The jury returned a verdict for Appellee assessing his damages at \$4,250.12. Motion for new trial was overruled and judgment was entered on the verdict from which Appellant prosecutes this appeal.

The facts are directly in dispute. Appellee testified that he had long been a stockholder and a customer of the Appellant bank; that on May 1, 1929 he spoke to Fred Reuling Jr, the cashier, about the purchase of some Morton Paving bonds, to which Reuling replied they had none. Appellee then replied that in that event





he would like to buy some Morton Grade School bonds. Reuling replied they had none of those but that they had other bonds just as good. After considerable conversation Appellee said he would not be interested in any other bonds unless the Appellant bank would agree to repurchase them at any time Appellee desired to sell them; that Reuling replied that he would only be too glad to agree to such an arrangement; that thereupon on two different occasions under the same agreement Appellee purchased bonds from the bank and paid for them; that late in the fall of 1931 and before there was any default in interest upon the bonds so purchased he applied to Fred Reuling to cash one or two of the bonds as per the agreement of the bank to buy them back at any time. Mr. Reuling informed him that they had no funds available for that purpose just then but probably could later on; that on many more occasions Appellee applied to Mr. Reuling to repurchase the bonds under the agreement but the bank refused to take them over.

In behalf of Appellant, Fred Reuling Jr., testified and denied making the agreement to repurchase the bonds. While appellant argues other reasons for reversing the judgment, it is apparent from the opinion of the Supreme Court in the recent case of *Knass v. Madison & Kedzie Bank* 354 Ill. 554, that the contract here relied upon by Appellee is void as against public policy, and that it was entirely outside of the power of the bank to make any such contract. No plea of ultra vires was filed in the instant case but a motion at the close of Appellee's evidence to return a verdict in favor of Appellant raised the question of the sufficiency of the evidence and should have been granted by the Court because Appellee's case was dependent upon a void contract which the Court did not have the power to enforce. In accordance with the Knass case above cited the Appellee was charged with notice that the bank was utterly without power to make the repurchase agreements.

Because the Appellee failed to make out a sufficient case it was error for the Court to deny the peremptory motion made at the close of Appellee's proof and the case is therefore reversed.

*Reversed.*

(Three pages in original opinion.)





Jack T. Reynolds, a Minor, by Merle Reynolds, his  
Father and next friend, Defendants in Error, v.  
C. O. Wedeberg, Doing Business as "The  
Medical Clinic," and Adolph Jacob  
Newman, Plaintiffs in Error.

*Error to the Circuit Court, Sangamon County.*

OCTOBER TERM, A. D. 1933.

274 I.A. 674<sup>4</sup>

Gen. No. 8795

Agenda No. 11

MR. JUSTICE FULTON delivered the opinion of the court.

This was an action of trespass on the case brought by Jack T. Reynolds, a minor, of the age of eight years, by his father and next friend for personal injuries sustained by said minor on June 17, 1932, by reason of the negligent operation of an X-ray machine by the Plaintiffs in Error.

A trial by jury resulted in a verdict for defendant in error for the sum of \$7500.00 which by order of the trial court and consented to by the Defendant in Error was reduced by remittitur to \$2000.00 and for the latter amount judgment was entered. From that judgment Plaintiffs in Error have prosecuted this writ of error.

The declaration in substance charges that at the time of the injury the Plaintiffs in Error conducted and operated, in the City of Springfield, an institution known as the "Medical Clinic"; that Plaintiff in Error, Dr. Wedeberg, owned and managed said Medical Clinic, and that Dr. Newman, the other Plaintiff in Error, actually operated the said clinic as the agent of Wedeberg; that in said Medical Clinic was an X-ray machine; that the said Jack T. Reynolds with all due care went to said Medical Clinic for examination and treatment and that Plaintiffs in Error accepted said employment; that the said Dr. Adolph Jacob Newman, as the agent and servant of Dr. Wedeberg then conducted such examination and treatment of the said minor by the use of said X-ray machine, but that Dr. Newman so negligently and carelessly operated the same in such a manner as to cause the Defendant in Error to be severely burned about the head, face and arms, and that he suffered a severe shock and injury to his nervous system. The Plaintiffs in Error pleaded the general issue and in addition each of them filed separate pleas denying the joint ownership and operation of said Medical Clinic, and further denying that



in the operation thereof the Plaintiff in Error Newman was acting as the agent of Dr. Wedeberg.

Plaintiffs in Error urge two grounds for reversal. First, that at the time of the injury Wedeberg was no longer connected with the operation of the Medical Clinic, and that a judgment against both Plaintiffs in Error is contrary to the manifest weight of the evidence.

In support of the joint liability the Defendant in Error introduced testimony showing that Dr. Wedeberg, a dentist by profession, maintained his private office at the southwest corner of the intersection of Monroe and Fifth streets in the City of Springfield. At the northwest corner of this same intersection was located a brick building owned by one Claypool, on the first floor of which was conducted Claypool's drug store. At some time before the injury Dr. Wedeberg rented the rooms above the drug store and began the operation of what is described as the "Medical Clinic". One room was used as a reception room, the rooms to the north were occupied by the "Medical Clinic" and those to the south by the "Dental Clinic". Dr. Wedeberg paid the rent on all of the rooms to Claypool. He also employed the janitor and paid him. This janitor also cared for Dr. Wedeberg's private office. He employed an office girl who served both clinics. The advertising for the Medical Clinic was submitted to Dr. Wedeberg upon which he placed his O. K. for the credit of same. Dr. Meyer, an employee of the Medical Clinic before the re-arrangement in March 1932, and from that point on with the "Dental Clinic" testified that both he and Dr. Newman made weekly reports to Dr. Wedeberg, down to July, 1932, at which time Dr. Meyer severed his connection with the "Dental Clinic".

He also testified that Dr. Wedeberg told him in the latter part of June 1932, that he was going to cut all their salaries including Dr. Newman. On this issue Plaintiff in Error proved by Dr. Wedeberg and Dr. Newman that the latter was employed on a salary from January 6, 1932, until March 14, 1932, to operate the Medical Clinic. That on the latter date Dr. Newman took over the Medical Clinic as his own, paying rent for the office space and equipment; that he was furnished janitor service as part of the rental agreement, and that Dr. Wedeberg was only the landlord on June 17, 1932, at the time of the injury. This testimony about the change in management on March 14, 1932, was corroborated by Mr. Ransdell and Dr. Marshack.

While the testimony of the defendant in error is somewhat circumstantial in its nature, there were suf-





ficient facts proven to warrant the court in submitting to the jury the question of whether or not Dr. Wedeburg was interested as an owner of the Medical Clinic on June 17, 1932, and having found that issue of fact in favor of the defendant in error, there is nothing so convincing about the proof of Plaintiffs in Error as to justify this Court in finding that the verdict was contrary to the manifest weight of the evidence.

The other assignment of error relied on by Plaintiffs in Error was that the verdict of the jury was excessive and that the action of the Court in ordering a remittitur from \$7500.00 to \$2000.00 indicated that the verdict was the result of passion and prejudice and should be set aside. In this case the defendant in error, a boy eight years of age, had injured his arm and desired an X-ray picture taken to ascertain whether the arm was broken. His mother took him to the medical clinic where Dr. Newman was in charge and he proceeded to take the picture. We think the evidence clearly shows that Dr. Newman negligently permitted the spark-gap to be placed too close to the boy's head and when the current in the X-ray machine was turned on it caused an intense spark to jump from the end of the tube to the left side of the boy's head and out from his left arm to the metallic cone attached to the tube. The boy immediately fainted, became unconscious and fell from the chair in which he was placed to the floor. The incident occurred in the forenoon and the boy did not regain complete consciousness until evening. In addition to the shock, the hair on the left side of his head was singed off and burned for an area about the size of the palm of a hand and there were severe burns about the head and arms. The burns did not heal for about three months. The shock affected the boys nervous system so that he could not sleep well at night, was extremely nervous, lost weight, tired easily and was not so robust as before the injury. The doctors were unable to state how long this condition might continue. We do not think the judgment for \$2000.00 was so excessive under these circumstances as to warrant the Court in setting it aside.

"Remittiturs in action ex delicto, by the trial and Appellate Courts have been approved by this Court numbers of times". *Sandy v. Lake St. El. R. R. Co.*, 235 Ill. 194, citing *Chicago City Ry. Co. v. Gemmill*, 209 Ill. 638.

We do not find any substantial error in this record and the judgment of the lower court is therefore affirmed.

*Affirmed.*

(Four pages in original opinion)





PUBLISHED IN ABSTRACT

L. H. Hulan, et al, Defendants in Error, v. Lester Goodman, et al, Plaintiffs in Error.

*Writ of Error to Circuit Court, Greene County.*

JANUARY TERM, A. D. 1934.

274 I.A. 674<sup>5</sup>

Gen. No. 8816

Agenda No. 11

MR. JUSTICE FULTON delivered the opinion of the court.

Defendants in Error filed their bill in aid of execution to set aside two deeds executed by Lester G. Goodman and his wife to D. J. Williams and to subject the premises therein described to a sale under an alias execution. The decree of the Circuit Court found that the deeds were made without consideration, with intent to hinder, delay and defraud the grantor's creditors and that the grantee D. J. Williams, held the title to the real estate for the use and benefit of Lester G. Goodman. Plaintiffs in Error insist there is no evidence in the record to support any of said findings. The proof shows that Lester G. Goodman was a son-in-law of D. J. Williams; that on November 29, 1928, Goodman and his wife conveyed the real estate in controversy to the said D. J. Williams by two deeds which were filed for record on August 8, 1930; that Lester G. Goodman was also a stockholder and director for many years in the Kane State & Savings Bank of Kane, Illinois, which closed its doors and ceased to do any business on August 14, 1930; that subsequently the Defendants in Error, as creditors of said bank brought suit to enforce the liability of the bank's stockholders and on September 17, 1931, recovered a decree against Goodman for \$2000.00, he being the owner of twenty shares of stock in the closed bank; that an execution was issued thereon and returned nulla bona by order of complainants attorney. The testimony of the Plaintiffs in Error shows quite conclusively that at the time of the conveyances in November 1928, Lester G. Goodman was indebted to his father-in-law in the sum of \$4700.00 which was cancelled at the time the deeds were delivered, and that the said amount was a reasonable consideration for the land conveyed. While the fact that the deeds were dated in November 1928, and not recorded until August 8, 1930, might, because of the relationship of the parties be considered a suspicious circumstance, still the execution of the deeds



in 1928 is quite definitely established by the testimony of the Notary who took the acknowledgment and the party who attested the deed as a witness.

The evidence presented on the part of the Defendants in Error tends to show that the bank had not paid dividends for many years; that Goodman had attended directors meetings and knew something about the affairs of the bank which had not been particularly prosperous for several years before closing; that an assessment of 50% was levied upon all the stockholders in September 1929; that the report of the examiner under date of June 19, 1930, showed the condition of the bank to be unsatisfactory and that the children of Goodman and certain officers of the bank had withdrawn small deposits from the bank shortly before it closed.

While the testimony disclosed the financial condition of the Kane State & Savings Bank and that it was not flourishing it is reasonable to infer from all the evidence that its officers and directors did not feel that it would have to close its doors until the last few days before August 14, 1930. The deeds were executed and delivered in 1928, about one year before the sensational collapse in prices and general business affairs, and almost two years before the bank closed.

We do not feel that the facts proven are sufficient to warrant a finding of fraudulent intent on the part of Goodman and against his creditors in the making of these deeds. Fraud will not be presumed but must be proved by clear and convincing evidence, *Garrett v. Garrett*, 343 Ill. 577. Where a conveyance is made upon a valuable consideration and is alleged to be fraudulent as against the grantor's creditors, an actual and express fraudulent intent must be proved without the aid of any legal presumptions, and it must appear that both parties participated in the fraud; it is not enough that the conveyance may have the effect to delay and hinder creditors, *Behrens v. Steidley*, 198 Ill. 303. *State Bank of Mansfield v. Moore State Bank*, 249 App. 237.

The fact that the parties were related is no proof of fraud or that there was no bona fide indebtedness. *Ayers National Bank v. Barber*, 287 Ill. 182.

In the present case the conveyances were to Mrs. Goodman's father, but he lived twenty miles distant from Kane and there is no testimony showing that he had any knowledge whatever of the bank's condition or that he was in any way connected with its business affairs. He was employed by the Burlington Railroad as a bridge and building foreman and was away from home at least six days every week.

It is our judgment that the evidence does not support the finding that the deeds in this case were made





without consideration and with intent to hinder delay and defraud the grantor's creditors and that the grantee holds the title to the real estate for the use and benefit of the grantor and the decree of the Circuit Court is therefore reversed.

*Reversed.*

(Three pages in original opinion)





STATE OF ILLINOIS,  
APPELLATE COURT,  
FOURTH DISTRICT.

FILED

MAR 12 1934

Walter M. Buchanan  
CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS

Term No 26

October Term, 1933.

Agenda 13.

W. B. Douhitt,

Appellee,

vs.

J. B. Van Preters, et al.,

Appellants.

274 I.A. 675<sup>1</sup>

Appeal from Circuit Court of

Madison County.

EDWARDS, P. J.

This appeal is to review a decree of the Madison County Circuit Court, awarding a mechanic's lien, in the sum of \$2,500.00, in favor of appellee, and against the appellants, J. B. Van Preters and Luella R. Van Preters, growing out of a contract to install a heating system in the garage of the Van Preters, by the appellee, and which it was claimed did not conform to, nor fulfill, the terms of the contract.

In August, 1929, appellant, J. B. Van Preters, contracted with appellee to install for him, in his garage then in course of construction, a heating plant consisting of a steam, air-driven with fan, system, which should heat the building to a temperature of 70 degrees Fahrenheit during outside zero weather. The contract price was to be \$2,500.00. The manner of payment was in dispute, and as to same, the testimony sharply conflicted. The heating plant was completed about January 30, 1930. No payments were made on the contract; proper claims for lien were filed, and the failure to pay is the basis of this suit.

Appellants, the Van Preters, contend that the heating system did



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not comply with the contract; that it would not, in zero weather, heat the building to anywhere near the 70 degrees; while appellee insists that, if properly fired, it would heat the garage to the required degree; that it was so proven by test, and that examination of the boiler and grates disclosed that appellants did not properly tend the fire, nor did they use a sufficient amount of coal therefor. After a reference to the Master, he reported that the system was sufficient in all regards, except that the boiler was too small, and recommended that appellee be given 90 days time in which to make certain additions thereto, and that upon same being done, that appellee should be entitled to a lien therefor.

Upon hearing of the report before the Chancellor, the latter sustained certain exceptions to the Master's report; made a general finding that the heating system was adequate, and conformed to the terms of the contract; that appellee should have his lien, and that same should be prior to the rights of appellant, Benld Loan Association, holder of a mortgage upon the garage property. From such decree this appeal is prosecuted.

The heating plant consisted of a Capital Smokeless Steam Boiler, No. 1127, with steam pipes leading to five radiators. Behind these were motor-driven fans which blew the air through the radiators, thereby heating the air and discharging it into the building. The boiler furnished the steam to the fans, placed in various positions in the building, by steam pressure from such boiler. The air from the fans cooled the radiators, condensed the steam to water, and the water then returned to the boiler by gravity through return pipes. The fans were suspended from the ceiling by brackets, and the boiler was located in the basement of the building, which was divided into two rooms, consisting of a front or show room, and a rear or repair and work shop. The building was 75 feet in length, the front of which was all glass, set in copper frames, to form what is called frost-proof windows; at the base of which were air slots, one-eighth of an inch high, five-eighths of an inch long, and spaced five inches apart, along the entire front of the building.



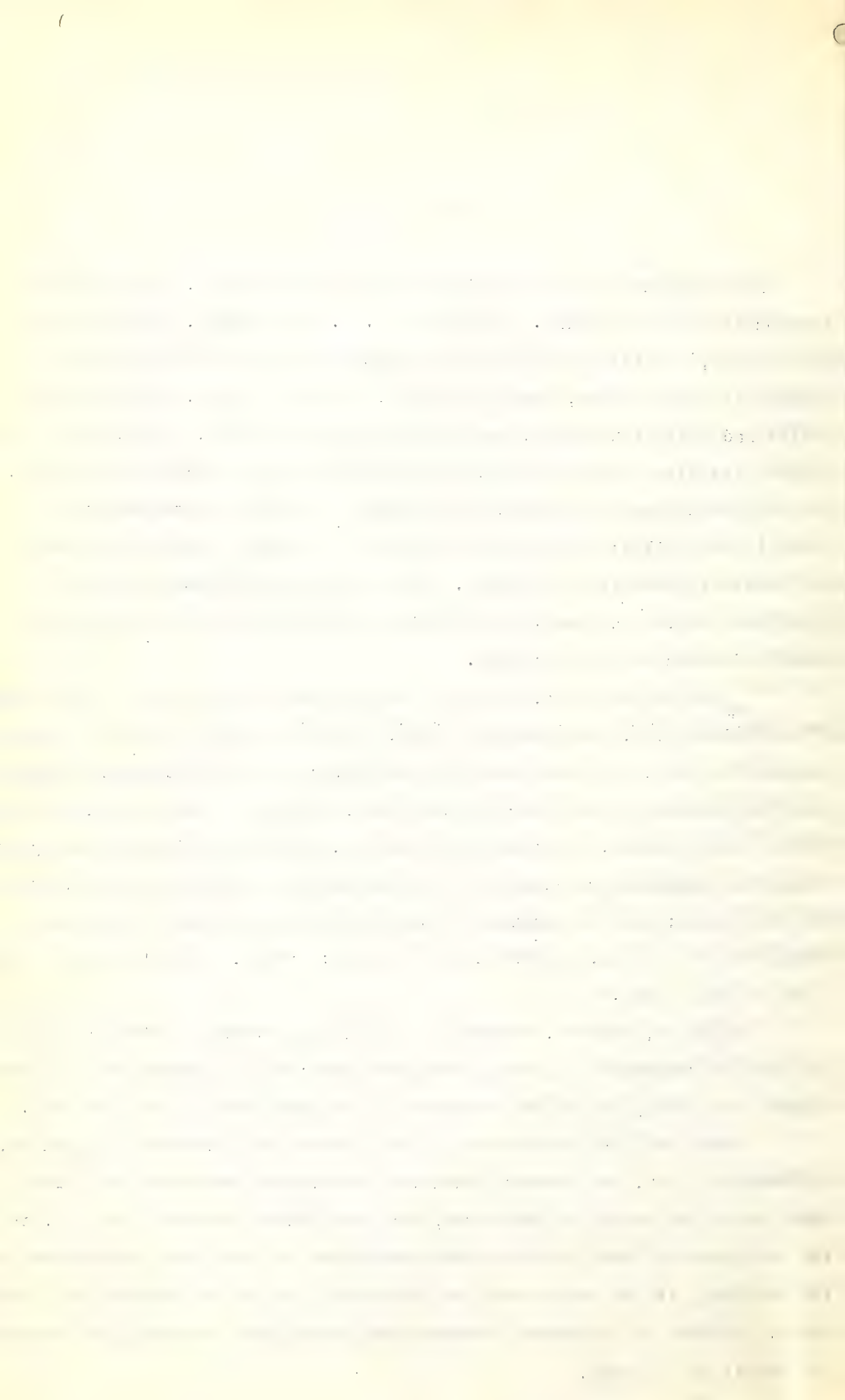


The testimony as to the salient features of the case, is sharply and irreconcilably conflicting. Appellant, J. B. Van Preters, and certain of his helpers, testified that they were unable to heat the building to 70 degrees in zero weather, due to the fact, as they claimed, that when the boiler had sufficient steam, and the fans were turned on, that in about 15 minutes the steam would go down; after which the fans would blow cold air, and they would have to be shut off to await a sufficient achievement of steam in the boiler; that same was too small to keep a reserve of steam and constant pressure at the fans. There was also testimony offered by appellant tending to show that the boiler was too small to furnish sufficient radiation for the building.

For the appellee, the proof was to the effect that the boiler was of sufficient size, when properly fired, to furnish enough steam of constant quantity to supply all the necessary radiation; that investigation revealed that Van Preters did not properly tend the furnace, nor use sufficient coal. That on one occasion, a witness for appellee, who went to inspect the system, found that only about one-fourth of the grates were covered with coal, which was not enough; that he inquired of the party in charge, as to what was wrong with the boiler, and the latter replied: "Well, we don't want to burn a ton of coal a day."

Appellee, himself, testified that he had personally fired the boiler, and that it responded by giving sufficient heat; that he found the pit rather choked with ashes, and on one occasion had removed three loads therefrom.

There was also evidence of a test made at the instance of appellee, in February, 1930, on a morning when the temperature was about 10 degrees above zero; the result of which was, that the boiler fired by appellee, in two and one-half hours produced heat sufficient to raise the temperature of the building, in the sales room, to 75 degrees, and in the garage to 77 degrees, as shown by calibrated thermometers taken there especially to record the result of the test.





Appellant sought to minimize the force of the test by offering proof that one of the thermometers was placed on the radiator of an automobile, in direct line with the air current from one of the fans, and that the temperature varied in different parts of the building at the time, as much as 10 degrees.

There was also expert testimony, for appellee, to the effect that the boiler was of sufficient size, if properly fired, to heat the building to a temperature of 70 degrees, when it stood at zero out of doors; also, that the air coming in through the slot apertures at the base of the frost-proof windows along the front of the building, would render it more difficult to heat than if the windows were of the ordinary closed type; while for the appellants, there was also the testimony of experts, to the contrary.

Appellee claimed that at the time the contract was entered into, he did not know, nor was he told, that the windows were to be of this frost-proof variety, but that he supposed they were to be of ordinary kind. Appellant, J. B. Van Preters, and Otis Grover, testified that appellee admitted to them that the heating system was not right, but that he had done all in his power to make it so. These statements appellee denied.

Whether the boiler was of adequate size to heat the building to the required temperature, if properly fired; whether appellant tended it rightly or not, and whether it did in fact heat the building, as required by the contract, were all questions of fact.

Where a decree has been entered, based upon findings of fact, after consideration by the Chancellor of a voluminous record of conflicting testimony, as in this case, it must clearly appear that the conclusions were palpably and manifestly against the weight of the evidence, in order to warrant a reversal of the decree. *Cook v. Wolf*, 296 Ill., 27. In the state of this record, we are not prepared to say that the manifest weight of the testimony is contrary to the findings of the decree.



Appellant, Benld Loan Association, placed a loan, secured by a mortgage, upon the premises, on Sept. 28, 1929, or more than a month after appellee and the Van Preters entered into their contract. The rule is, that a mechanic's lien attaches from the date the contract is entered into, and whoever thereafter acquires an interest in the premises, takes same subject to the lien under the contract, and his rights are postponed to those of the lien holder. *Crown v. Meyer*, 342 Ill., 46. After the lien has attached, whoever deals with the property, does so at his peril, and is under the duty of taking such means as may be at his command, to ascertain whether the premises are incumbered by the lien, and whatever interest he may obtain therein is subject to such lien. *Clark v. Moore*, 64 Ill., 273. The decree rightfully adjudged the lien of appellee superior to that of the Benld Loan Association's mortgage.

For the reasons stated, the decree is affirmed.

Decree affirmed.

*not to be published in full.*





STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1932.

FILED

MAR 12 1934

*Walter M. Buchanan*  
CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS

Term No. 23.

Agenda No. 18.

Helen C. Pollard,  
Appellee,

vs.

Broadway Central Hotel  
Corporation,  
Appellant.

Appeal from the  
City Court of

East St. Louis.

274 I.A. 675<sup>2</sup>

MURPHY, J:

This case was before this court at a previous term. Several errors were assigned but the court, being of the opinion that appellee was not at the time of the accident in the exercise of due care and caution for her own safety, reversed the judgment of the lower court with a finding of fact to that effect and did not pass upon the other errors assigned. 269 Ill. App. 77. The Supreme Court granted a certiorari and upon a hearing reversed the judgment of this court and remanded the cause with directions to consider the other errors assigned and to either affirm the judgment or reverse the judgment and remand the cause. 353 Ill. 312.

The facts bearing upon the question of negligence of appellant and contributory negligence of appellee are fully set forth in those opinions and will not be restated here. We will confine our statement of facts to that part of the evidence which we deem necessary to consider in connection with the other errors assigned.

The remaining errors assigned are in reference to the rulings of the court of the court on the admission and rejection of evidence in the giving of certain instructions tendered by appellee and that the verdict, after remittitur, is excessive.

At the time appellee was injured, an employee of the hotel company, called Dr. Griffith to treat her. On the trial, appellee called the doctor as her witness. He testified as to the nature and extent of the injury and the treatment he administered. The record shows on rebuttal the following questions and answers.

Q. "Did you make a charge for your services?"

A. "I looked for it from the insurance company."

Q. "Was it paid?"





A. "I don't recollect--I know the first aid fee was paid."

Appellant made no objection at the time that the questions and answers were given, but later during the trial, made a motion to withdraw a juror and declare a mis-trial and assigned as a reason the witness' reference to an insurance company. It was a voluntary statement. The witness' reference to the insurance company was not responsive to the question and was not brought into the case by appellee or her attorney. Appellant made no motion to strike the evidence and did not ask the court to instruct the jury to disregard it. Had such motion been made, no doubt it would have been granted. The court did not err in overruling the motion to withdraw a juror and declare a mistrial. *Savage v. Hayes Bros. Co.*, 142 Ill. App. 316.

Appellant sought to prove by witness Widmer, an architect of many years experience, that the steps-up in the floor of the corridor, leading to the Fourth Street entrance, was a safe method of construction and one that was usually followed in the erection of hotels and other public buildings in that vicinity. The court sustained objection to such offer. The question for the jury did not call for a test of the sufficiency of such construction as compared with the construction of other public buildings in that community but whether there was negligence in the keeping and maintaining of these steps-up under the conditions and surrounding circumstances that existed at the time of the accident. The solution of such a question by the jury did not lead them into a consideration of such intricate facts or matters that they needed the opinion of an expert to aid them in forming a judgment thereon. There was no error in rejecting this expert testimony. *People v. Jennings*, 252 Ill. 534; *Siegel, Cooper & Co. v. Treka*, 218 Ill. 559.

Error is assigned on the giving of instructions numbered 21 and 22 tendered by appellee. These instructions were in reference to the measure of damages and are the same as have been considered and approved many times by the courts of review of this state. *Chic. and Mil. Elec. Ry. Co. v. Ullrich*, 213 Ill. 170; *Parmelee Co. v. Wheelock*, 224 Ill. 194; *Brennan v. City of Streator*, 256 Ill. 468; *Caughey v. Peoria Ry. Co.*, 164 Ill. App. 455.

Appellant contends that the reference in the instruction to the declaration was prejudicial error. This particular objection to a similar instruction was passed upon adversely to appellant's contention in *Bernier v. Ill. Cen. R. R. Co.*, 296 Ill. 464 and *Bonato v. Peabody Coal Co.*, 248 Ill. 422. That part of instruction 21 which told the



jury in determining the amount of damages to which the plaintiff was entitled, they had a right to and should take into consideration all the facts and circumstances, was criticized in Garvey v. Chicago Rys. Co., 339 Ill. 276, but held not to be reversible error.

The remaining error assigned is as to the amount of the verdict. The verdict was for \$9000. and the trial court required a remittitur of \$1500. A remittitur was filed and judgment entered for \$7500.

The evidence shows that appellee's fall resulted in the fracture of the left forearm at or near the wrist. Ex-ray pictures were taken at the time of the accident and disclosed a fracture of the distal end of the radius extending approximately into the wrist joint and also a fracture of the styloid process at the end of the ulna bone. The bones in the region of the fracture were broken into parts causing greater pain and suffering and requiring longer period for recovery than is usual in an ordinary fracture. Immediately after the fracture had been reduced, appellee was taken to her home in Omaha where she entered her husband's hospital for care and treatment, remaining there for a period of six weeks. After leaving the hospital, she was confined to her bed most of the time for a period of six months. Dr. Schrock, a bone specialist in Omaha and Dr. Rubnitz, a pathologist on diseases of the blood and stomach, gave her medical attention. This extended over a long period of time. The injury was followed by certain nervous disorders. After leaving the hospital, appellee wore a splint until July, 1931. The evidence shows that as a result of the injury, the bones were atrophied and weakened and that during all this time she suffered pain from the injury. Appellee's age is not shown in the abstract but from facts appearing in the record, we assume that she is middle age or past. Prior to the accident, she drove a car, did sewing and a part of her household duties in caring for her own home. The doctors, testifying for appellee, gave it as their opinion that the injury was permanent and that appellee would lose one-third the usefulness of that arm. It appears that further medical treatment would be necessary and that at the time of the trial, the total pecuniary loss for medicine, medical bills and violet ray treatments was in excess of \$900. From a consideration of all the evidence, we cannot say that the verdict was the result of bias or prejudice of the jury or that it is so excessive as to demand a reversal on that ground.

For the reasons assigned, the judgment of the lower court will be affirmed.

Judgment Affirmed.

Not to be published in full.





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STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT  
FEBRUARY TERM, A. D. 1934.

FILED  
MAR 12 1934  
Walter M. Buckham  
CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS

Term No. 28

Agenda No. 26.

|                     |   |                 |                           |
|---------------------|---|-----------------|---------------------------|
| IYA RAGLAND         | } | Error to the    | 274 I.A. 675 <sup>3</sup> |
| Defendant in Error  |   | City Court of   |                           |
| vs.                 |   | West Frankfort. |                           |
| A. T. RAGLAND       |   |                 |                           |
| Plaintiff in Error. | } |                 |                           |

Stone, J:

At the May Term, 1933 of this Court an opinion was filed in the above entitled cause, sustaining the demurrer to Plaintiff in Error's replications to the pleas of Defendant in Error alleging that Plaintiff in Error was in contempt of the trial Court and therefore could not be heard here on his writ of error by reason of that fact Plaintiff in Error was given leave to file amended replications which he did. Demurrer was interposed to these and upon further consideration, we filed an opinion on December 26th, 1933 holding that the amended replications did not answer the pleas. Being anxious, however, that no injustice be done, Plaintiff in Error, we said:

"The trial court is in better position than this court to determine what equity requires to purge plaintiff in error of contempt. His present ability to pay the amounts now unpaid is a question proper for that court to consider. No evidence on that subject is preserved for our inspection.

As his answer to the original bill was rejected by the trial court on his first contempt in refusing to pay, and the dismissing of his writ of error would perhaps deprive him of any right of review, (the decree being two years old, and a new law of practice taking effect January 1, next,) and as the lapse of time may have developed facts which should be considered in a court of





equity with respect to the amount plaintiff in error ought now to be required to pay, it is ordered that proceedings in this court on the present writ of error be stayed until the first day of the next February term of this court.

In the interim between now and that date, plaintiff in error, if he be so advised, may apply to the trial court for such modification of the existing orders concerning alimony and expense money to be paid by him, as equity may require, may make such showing to that court as the facts justify and purge himself of contempt. That court still retains jurisdiction of the questions of alimony and expense money involved in the original suit, in their application to the matter of contempt."

In response to the above quoted part of our last opinion. Plaintiff in Error comes into Court with a long report of controversies with the trial Court. He is in no better shape than he was on his writ of error at the October Term or the May Term, 1933. We have made no progress.

We feel that we have been generous with Plaintiff in Error in this matter. We do not feel warranted in holding any longer the issue before us waiting for adjustment of matters which are cognizable only in the trial Court.

As stated in our former opinion the replications do not answer the pleas and are obnoxious to demurrer. The demurrer to the replications is sustained; judgment is awarded upon the pleas and the writ of error is dismissed.

WRIT DISMISSED

*not to be published in full.*









Ill. Unpublished opinions

274

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